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Judgments of the Administrative Tribunal of the International Labour Organization:

91st Session

(April-July 2001)

International Labour Office
Geneva

ISSN 0378-7362

First published in 2001

Annual subscription: 70 Swiss francs

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The Administrative Tribunal of the International Labour Organization (ILO) is competent to hear complaints against international organisations that have recognised its jurisdiction. These organisations are the following (in order of recognition):

International Labour Organization (ILO), including the International Training Centre
World Health Organization (WHO), including the Pan American Health Organization (PAHO)
International Telecommunication Union (ITU)
United Nations Educational, Scientific and Cultural Organization (UNESCO)
World Meteorological Organization (WMO)
Food and Agriculture Organization of the United Nations (FAO)
European Organization for Nuclear Research (CERN)
World Trade Organization (WTO)
International Atomic Energy Agency (IAEA)
World Intellectual Property Organization (WIPO)
European Organisation for the Safety of Air Navigation (Eurocontrol)
Universal Postal Union (UPU)
European Southern Observatory (ESO)
Intergovernmental Council of Copper Exporting Countries (CIPEC)
European Free Trade Association (EFTA)
Inter-Parliamentary Union (IPU)
European Molecular Biology Laboratory (EMBL)
World Tourism Organization (WTO)
European Patent Organisation (EPO)
African Training and Research Centre in Administration for Development (CAFRAD)
Intergovernmental Organisation for International Carriage by Rail (OTIF)
International Center for the Registration of Serials (CIEPS)
International Office of Epizootics (OIE)
United Nations Industrial Development Organization (UNIDO)
International Criminal Police Organization (Interpol)
International Fund for Agricultural Development (IFAD)
International Union for the Protection of New Varieties of Plants (UPOV)
Customs Co-operation Council (CCC)
Court of Justice of the European Free Trade Association (EFTA Court)
Surveillance Authority of the European Free Trade Association (ESA)
International Service for National Agricultural Research (ISNAR)

International Centre for Genetic Engineering and Biotechnology (ICGEB)
Organisation for the Prohibition of Chemical Weapons (OPCW)
International Hydrographic Organization (IHO)
Energy Charter Conference (ECC)
International Federation of Red Cross and Red Crescent Societies
Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom)
European and Mediterranean Plant Protection Organization (EPPO)
International Plant Genetic Resources Institute (IPGRI)

NINETY-FIRST SESSION

***In re* Benze (No. 9)** **Judgment No. 2044**

THE ADMINISTRATIVE TRIBUNAL,

Considering the ninth complaint filed by Mr Wolfgang Eberhard Benze against the European Patent Organisation (EPO) on 27 June 2000 and corrected on 22 August, the EPO's reply of 13 November, the complainant's rejoinder of 30 November, and the Organisation's letter of 15 December 2000 informing the Registrar of the Tribunal that it did not wish to enter a surrejoinder;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a German national born in 1938, is a permanent employee of the European Patent Office, the EPO's secretariat. During the reporting period 1994-1995 he worked in Directorate-General 2 (DG2) as a "chief examiner" at grade A4 and was the coordinator of the group of examiners which dealt with mining.

In April 1996 he received his staff report for 1994-1995. He disagreed with some of the ratings and remarks that it contained, so on 2 May 1996 he filed a counterstatement to it. The reporting officer added final comments on 30 May and signed it. On 27 June the complainant requested a conciliation procedure in accordance with Section D of the General Guidelines on Reporting since the signed version of his staff report still contained comments that he considered to be inaccurate. A hearing with a mediator was held on 26 February 1997.

On 13 March the reporting officer sent the mediator a draft staff report which had been amended to reflect the agreement reached during the hearing. Some of the disputed comments had been either deleted or amended and some of the markings were upgraded from "good" to "very good". This draft was sent to the complainant for signature along with an annex to the staff report, dated 20 March 1997, which listed the changes that had been made. Subsequently, the complainant added a paragraph at the end of the annex. Both the reporting officer and the countersigning officer refused to sign the annex and the amended staff report unless the complainant withdrew that paragraph. The complainant refused.

As provided for in Section D, paragraph 6, of the General Guidelines on Reporting, the mediator, at the complainant's request, drew up a report – dated 19 January 1998 – for the Vice-President of DG2 stating the different viewpoints of those involved in the conciliation procedure. On 21 January the Vice-President recommended that the President of the Office sign the complainant's unamended staff report, namely the version of May 1996. On 22 January the President endorsed that version of the report.

In a letter dated 12 February 1998 the complainant requested the President to amend the staff report in respect of the issues dealt with in the conciliation procedure. The President refused to do so and referred the letter to the Appeals Committee. In its opinion, dated 31 January 2000, the Committee recommended that the complainant's staff report be reviewed in the light of its findings and that the quality of the complainant's work should be rated "very good", as had been decided during the conciliation proceedings. On 20 March 2000 the President informed the complainant that he had decided to upgrade the ratings in Part I.1 ("Quality") and Part V ("Overall rating") of the staff report but not to change the rating in Part III ("Attitude to work and dealings with others"). On 21 March 2000 the complainant asked the President to review his decision regarding Part III. By a letter of 3 May 2000 which is the decision the complainant impugns, the President confirmed his earlier decision. The amended staff report was sent to the complainant with this letter.

B. The complainant argues that there was no "investigation of the facts" during either the conciliation or the appeal procedures. He contends that the contested comments on his report are baseless, are motivated by a personal conflict he has had with the reporting and countersigning officers, and are discriminatory. They are also libellous and should be removed. He alleges that, throughout his career at the ECO, he has been "kept from exercising influence in terms of realising formal management functions".

The complainant asks the Tribunal to order the ECO: (1) to remove offending remarks under Parts III and V of his 1994-1995 staff report and to upgrade his rating under Part III to "very good"; (2) to complete Part IV on "Management ability", reflecting the success of the group of examiners dealing with mining and his contribution as its coordinator; (3) to promote him to grade A4(2) as from 1 May 1998; and (4) to award him damages in the amount of one year's salary for "continued discrimination". He also asks that the EPO be fined 10,000,000 euros for maintaining a "fraudulent reporting and promoting system", and that this be paid to the charitable organisation "SOS-Kinderdorf".

C. In its reply the EPO submits that the complaint is irreceivable. The President's decision of 20 March 2000, which the complainant received no later than 21 March, was a "final decision" within the meaning of Article VII of the Tribunal's Statute. The President's letter of 3 May, which the complainant impugns, was merely confirmation of that final decision. The complaint, therefore, was filed after the expiry of the ninety-day deadline imposed by the Tribunal's Statute. Additionally, apart from the first one, all his claims are irreceivable because they were not addressed in his appeal; consequently, he has not exhausted the internal means of redress.

Subsidiarily, the ECO argues that the complaint is unfounded. The decision to alter a staff report is discretionary and can only be challenged on limited grounds. The reporting and countersigning officers were justified in not signing the annex to the staff report because the complainant had altered it by adding a paragraph following the hearing of 26 February 1997. The final decision to amend or not to amend a staff report rests with the President of the Office; in the complainant's case the President had agreed to certain amendments and not to others, as was his right to do so.

D. In his rejoinder the complainant submits that his complaint is indeed receivable. The decision could not be considered final until he received the amended staff report, which was sent to him with the President's letter of 3 May 2000.

He reiterates that no evidence has been presented to justify the ratings, which he contests, on his staff report. Not only has his right to a factual staff report been breached, but this breach could have negative consequences on his chances for future promotions.

CONSIDERATIONS

1. On 12 February 1998 the complainant initiated an internal appeal in respect of his staff report for 1994-1995. The Appeals Committee gave its opinion on 31 January 2000.

2. By a letter dated 20 March 2000 the President, referring to the internal appeal and the recommendation of the Appeals Committee, informed the complainant that, after examining the documentation, he had decided to amend the staff report as set out in the letter.

3. By a reply dated 21 March 2000 the complainant asked the President to improve the rating under Part III of the report, delete the "libellous vocabulary" or undertake a "fair investigation".

4. By a letter of 3 May 2000, the President expressly confirmed his decision of 20 March 2000. This is the decision impugned.

5. The decision of 20 March 2000 is the final decision on the complainant's appeal within the meaning of Article VII of the Statute of the Tribunal. The decision of 3 May 2000 was merely confirmatory and did not initiate any new limitation period.

6. Under Article VII of the Statute of the Tribunal, to be receivable, a complaint must be filed within ninety days after the complainant has been notified of the final decision. The complainant had received the final decision by 21 March 2000. This complaint was filed on 27 June 2000, that is to say, outside the time limit for appealing. It is, therefore, irreceivable.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 27 April 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

James

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

NINETY-FIRST SESSION

***In re* Müller-Engelmann (No. 9)** **Judgment No. 2045**

THE ADMINISTRATIVE TRIBUNAL,

Considering the ninth complaint filed by Mrs Jutta Müller-Engelmann against the European Patent Organisation (EPO) on 16 November 1999 and corrected on 20 December 1999, the EPO's reply of 19 April 2000, and corrected on 12 May, the complainant's rejoinder of 14 August, and the Organisation's surrejoinder of 13 November 2000;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Some facts relevant to this case are set out in Judgment 1829 on the complainant's first complaint. She was granted an invalidity pension and retired from the EPO on 1 August 1999.

On 16 September 1996 the complainant presented a medical certificate prescribing sick leave from 11 September to 31 December 1996. Consequently, she approached the maximum amount of sick leave allowable under Article 62(6) of the Service Regulations for Permanent Employees of the European Patent Office. She was accordingly asked to consult the Office's medical officer, Dr F., by virtue of Article 26(2) of the Service Regulations and Rule 6(i) of Circular No. 22. She was examined by Dr F. on 26 September 1996.

On 29 September the complainant forwarded to Dr F. the results of the images from a Single-Photon Emission Computerized Tomography (hereinafter SPECT images), taken by a specialist which she had received from her own doctor only after her appointment with Dr F. The latter sent these results to a radiologist, Dr K., who assessed them on 2 October 1996. On 8 November Dr F. returned these results to the complainant without comment.

Dr F. issued a report, dated 5 December 1996, assessing the complainant's fitness for work, and the EPO sent the complainant a copy on 6 December. The report indicates that Dr F. based her opinion partly on "*allgemeiner Untersuchungsbefund*" (which is translated in an Annex provided by the complainant with her complaint as "general findings of the examination") and "*Befundung von Fremdaufnahmen vom 02.10.96*" (which is translated in the same Annex as "findings on external takings dated 02-10-96").

On 9 January 1997 the complainant appealed to the President of the Office asking that the general examination results and the assessment of the SPECT images be sent to her. On 12 February the Director of Personnel Development informed her that the President had rejected her request and had subsequently referred the matter to the Appeals Committee. On 13 February the complainant contacted Dr F. directly, asking her for the information in question. On 18 February Dr F. replied that the complainant did not have the right to obtain her personal notes regarding the results of the physical examination, and that to obtain the assessment of the SPECT images the complainant would need to contact Dr K. On 21 February the complainant asked Dr K. to send her the assessment. He replied on 25 February that he was unable to comply with her request without being ordered by the EPO to do so. In March she again wrote to the EPO to request the same information. In a reply of 19 March 1997 the Administration told the complainant that it did not have the information in its possession.

In its opinion dated 16 June 1999 the Appeals Committee unanimously recommended rejecting her appeal as unfounded on the grounds that "[a]s far as the Office is in possession of [the medical documents she refers to] they are also at the disposal of the Complainant (reports of the medical officers)". The President of the Office endorsed that recommendation on 17 August 1999. That is the impugned decision.

B. The complainant specifies that she challenges the President's decision only in part. Her claims are limited to the disclosure of the "general examination results" and the assessment of the SPECT images, plus costs. She claims that she has a right to be informed of the findings of her medical examinations and this information could prove useful in her claims for reimbursement of medical expenses. She contends that she did not ask for the personal notes of Dr F. but was requesting two official documents on which that doctor's report was based. She had contacted Dr K. directly to ask him for his assessment, but he had refused to give it to her without an order from the EPO.

She notes that the Appeals Committee opinion does not mention the fact that she has requested these documents on more than one occasion; moreover, its recommendation to reject her appeal has made it even more difficult for her to obtain the requested information. She takes issue with the argument that the EPO cannot deliver the documents because it is not in possession of them. This contradicts the ruling in Judgment 1684, *in re* Forté, where the Tribunal held that because the EPO commissioned reports from its medical officer it could "get them back or demand copies". Since the medical officer's report was produced at the EPO's request she sees no reason why it could not order that the required documents be put at her disposal. The Appeals Committee did not give an opinion as to her claim for costs; she believes she is entitled to costs relating to the appeals proceedings. She requests oral proceedings.

She seeks a ruling that the EPO should instruct Dr F. and Dr K. respectively to make available to her the "general examination results" ("*allgemeiner Untersuchungsbefund*") and the assessment of the SPECT images, dated 2 October 1996 ("*Befundung von Fremdaufnahmen vom 02.10.96*") which were both referred to in Dr F.'s report of 5 December 1996. She also asks to be awarded costs relating to the internal appeal proceeding in the amount of 1,171.60 German marks plus interest at

8 per cent per annum, as well as costs equal to "the actually incurred amount" in bringing her complaint before the Tribunal.

C. In its reply the Organisation submits that the complaint is irreceivable as regards her claim for costs relating to the internal appeal, since the complainant did not request these during the appeal proceedings.

It contends that the claim for the production of documents lacks substance. According to "information received orally" from Dr F., the term "*allgemeiner Untersuchungsbefund*" refers to a general physical examination i.e. height, weight, blood pressure, heart and lung functioning, and is synonymous with the term "*körperlicher Untersuchungsbefund*" which she used in her letter of 18 February 1997 to refer to the same examination. Dr F. said that she carried out such an examination on the complainant, noted down the results and used them as a basis for her report of 5 December 1996. She added that, in order to avoid any misunderstanding, she should have used the second of the two terms in her report. The complainant has, however, already admitted that she has no entitlement to such personal medical notes, and therefore her claim to "*allgemeiner Untersuchungsbefund*" no longer has any substance. Additionally, the complainant was informed that she could review the assessment made by Dr K. in his office any time she wished. In this regard, it points out that at no time has the complainant requested the EPO to authorise Dr K. to send her a copy of his assessment of 2 October.

The Organisation states that, since the complainant received a copy of the medical officer's report of 5 December, the reference she makes to Judgment 1684 is not pertinent. It stresses that although it requested the examination carried out by Dr F. it was that doctor who asked Dr K. to assess the SPECT images. The Organisation is not in possession of any medical report. As a matter of principle it does not receive such reports because they are covered by professional secrecy.

Given the lack of substance in the complaint, it asks that the complainant's requests for oral proceedings and costs be rejected.

D. In her rejoinder the complainant takes issue with the EPO's rendering of certain facts. She points out that she did indeed take up Dr K.'s offer to review the assessment. She went to his office and he read aloud his report. However, she was never given a written copy it. As concerns the examination carried out by Dr F., she points out that Dr F. neither measured her height and weight, nor took her blood pressure, therefore the "general examination results" (*"allgemeiner Untersuchungsbefund"*) cannot contain that information. She notes that the defendant is attempting to create the impression that such results do not exist.

She expands upon her plea that she has a right of access to her medical documents and asserts that this right is protected by German legislation.

E. In its surrejoinder the EPO reiterates that it has not withheld information from the complainant and that it is unable to give a copy of Dr K.'s assessment to the complainant since it is not in possession of it. Moreover, as the complainant has already admitted, she is not entitled to the personal notes of Dr F. The issue comes down to whether the *"allgemeiner Untersuchungsbefund"* was based on the physician's private notes, and it has no reason to doubt that this was so.

CONSIDERATIONS

1. The complainant attacks a decision of the President of the European Patent Office to reject his internal appeal which resulted in the complainant being denied copies of the *"allgemeiner Untersuchungsbefund"* (hereinafter "Document 1") and the *"Befundung von Fremdaufnahmen vom* 02.10.96" (hereinafter "Document 2").

2. The complainant was a permanent employee at grade A3 with the EPO. She was granted an invalidity pension and retired on 1 August 1999. On 16 September 1996 she provided a certificate prescribing sick leave for a period of four months. Since she was approaching the maximum sick leave allowed under the Service Regulations the EPO retained the services of its medical officer, Dr F., for an opinion as to the complainant's capability for service. The complainant was examined by Dr F. on 26 September 1996.

3. On 29 September 1996 the complainant provided Dr F. with the results of the images from a Single-Photon Emission Computerised Tomography ("SPECT images"), taken by a specialist, which she had received from her own doctor. At the request of Dr F. these images were assessed by Dr K., a radiologist. His assessment was dated 2 October 1996. On 6 December 1996 the EPO provided the complainant with a copy of the report submitted by Dr F. on 5 December. The report was based, inter alia, on the following:

> "…
>
> - general findings of the examination [Document 1],
>
> …
>
> - findings on external takings dated 02-10-96 [Document 2],
>
> "[*]
>
> …

4. By a letter of 9 January 1997 the complainant appealed to the President requesting from the EPO, inter alia, a copy of Document 1 and Document 2. On 12 February 1997 the EPO refused the request and sent the appeal to the Appeals Committee for an opinion.

5. On 16 June 1999 the Committee recommended unanimously that the appeal be rejected as unfounded. As translated in an Annex provided by the complainant, the Committee stated the following at paragraph 97 of its opinion:

> "The appeal for return of the named medical documents is unfounded. As far as the Office is in possession of such documents, they are also at the disposal of the Complainant (reports of the medical officers)."

6. On 17 August 1999 the President rejected the appeal in accordance with the Committee's recommendation. That is the impugned decision.

7. The complainant is seeking an order:

(1) enjoining the EPO's medical officer and Dr K., to provide the complainant with copies of their respective findings;

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[*] As translated from German in an Annex provided by the complainant.

(2) awarding her 1,171.60 German marks in compensation for the expenses of the internal appeal proceedings, plus interest at a rate of 8 per cent per annum since the filing of the complaint; and

(3) awarding her costs for "the actually incurred amount" of the expenses incurred in the proceedings before the Tribunal.

8. The EPO submits that the complainant's claim for the transmission of Document 1 lacks substance as the term "*allgemeiner Untersuchungsbefund*" means a general physical examination (height, weight, blood pressure, heart and lung functioning). Dr F. carried out such an examination, noted its results and used them as a basis on which she founded her report. According to that doctor, the term "*allgemeiner Untersuchungsbefund*" is synonymous with the term "*körperlicher Untersuchungsbefund*" used in her letter dated 18 February 1997, so the latter term should have been used in her report dated 5 December 1996 in order to avoid any misunderstanding. In view of this information and the fact that the complainant agrees that she is not entitled to the physician's personal notes, her claim for the transmission of this document no longer has any substance.

9. As for Document 2, the EPO submits that the complainant had the opportunity to view Dr K.'s assessment of the SPECT images in his office. The information she requests was, therefore, available to the complainant. However, instead of visiting Dr K. and insisting on delivery of the assessment as she did, she should have turned to the EPO to explain the situation and ask for authorisation of its disclosure. She did not do so. In addition, the complainant's request to Dr K. was not known to the EPO until 18 April 1999 when it received her comments on the position paper it filed on her internal appeal.

10. The EPO further submits that, although it requested the examination carried out by Dr F., who in turn asked Dr K. to assess findings by the complainant's own doctor, it does not possess any medical report since, as a matter of principle, it does not receive medical reports that are covered by professional secrecy.

11. As the Tribunal has recalled in Judgment 1684 *in re* Forté, medical records are strictly personal and the staff member's right to see them may not ordinarily be challenged. Accordingly, there is no reason for the complainant to be denied copies of documents that were used by Dr F. in her assessment of the complainant's capability for service. The real dispute between the parties seems to be as to whether the "general examination results", as described by the complainant, (Document 1), ever existed.

12. The only translation of the report of 5 December 1996 sent by Dr F. to the EPO is that provided by the complainant. There is no indication that more detailed findings were attached to this report. Given the various interpretations submitted by the parties, it is difficult to determine if the report described as Document 1 actually exists.

13. The EPO contends that the "*allgemeiner Untersuchungsbefund*" are Dr F.'s personal notes and that the term should be translated as "general physical examination". The EPO makes reference to the letter dated 18 February 1997 from Dr F. to the complainant informing her that she had no right to demand the surrender of her personal notes. The EPO also submits that Dr F. stated that she should have used the term "*körperlicher Untersuchungsbefund*" in her report of 5 December 1996, since it was that term that she used later in her letter to the complainant of 18 February 1997. However, the EPO does not provide its own translation of this term. The translation provided by the complainant of that letter renders it as: "personal notes regarding anamnesis and physical examination".

14. Since, in any event, the complainant's right is limited to receiving copies of whatever was given to the examining physician or transmitted by the latter to the EPO, it will be sufficient if the Tribunal orders the Organisation to direct the physician to furnish the complainant with whatever information the former has given to the EPO.

15. With regard to Document 2, there is no dispute that the document is a medical report prepared by Dr K. for the purposes of Dr F.'s opinion

as to the complainant's capability for service. The fact that the EPO does not have Document 2 in its possession is entirely irrelevant. The EPO retained the services of Dr F., who in turn requested Dr K. to provide the assessment. In that way, the EPO had access to Document 2 and should have provided a copy to the complainant when she requested it. It is also irrelevant that the complainant may be aware of the content of Document 2 as a result of Dr K. reading it to her. Accordingly, the Organisation should also be ordered to direct that Dr K. provide a copy of that report to the complainant.

16. As for the claim for the award of costs for the internal appeal the EPO argues that it must be rejected as the complainant failed to submit this at any time during the internal appeal proceedings. The complainant does not deny that she did not seek an award of costs from the Appeals Committee. This being the case, the claim for those costs is irreceivable.

17. There is no need to order oral proceedings.

18. Since the complainant succeeds, she is entitled to her costs before the Tribunal in the amount of 1,000 euros.

DECISION

For the above reasons,

1. The Organisation is ordered to direct the examining physicians to provide the complainant with copies of Document 2 ("*Befundung von Fremdaufnahmen vom 02.10.96*") and, assuming that such document exists, Document 1 ("*allgemeiner Untersuchungsbefund*").
2. It shall pay the complainant 1,000 euros for her costs before the Tribunal.
3. All other claims are dismissed.

In witness of this judgment, adopted on 27 April 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL
GENEVA

NINETY-FIRST SESSION

In re **Müller-Engelmann (No. 12)** **Judgment No. 2046**

THE ADMINISTRATIVE TRIBUNAL,

Considering the twelfth complaint filed by Mrs Jutta Müller-Engelmann against the European Patent Organisation (EPO) on 16 November 1999 and corrected on 21 January 2000, the EPO's reply of 19 April which was corrected on 12 May, the complainant's rejoinder of 17 August, and the Organisation's surrejoinder of 13 November 2000;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for the hearing of witnesses;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Some facts relevant to this case are set out in Judgment 1829 on the complainant's first complaint. In December 1996 the complainant was reaching the maximum allowable sick leave under Article 62 of the Service Regulations for Permanent Employees of the European Patent Office, therefore the Office started the procedure to convene an Invalidity Committee. The procedure for nominating the three medical practitioners on the Invalidity Committee is set out in Article 89 of the Service Regulations: the President of the Office and the permanent employee each appoint one member and the third is "appointed by mutual agreement" between the other two members. However, in the complainant's case, more than one year after the commencement of the procedure, there was still no agreement on the third member; therefore, the EPO asked the Medical Advisory Board of the State of Bavaria (*"Bayerische Landesärztekammer"*) to propose the third member. On 11 May 1998 the Director of Personnel Management informed the complainant that following the Board's recommendation Dr H. had been nominated. On 17 May 1998 the complainant appealed against the nomination of that physician on the ground that it had not been done in accordance with the Service Regulations. That appeal was registered as RI/43/98; it was withdrawn in May 1999.

In May 1998 the complainant was asked to undergo a medical examination by Dr H. She refused because she was contesting the manner in which he had been appointed to the Committee. Consequently, in a letter dated 8 June 1998, the Director of Personnel Management declared the complainant's absence from work as unauthorised, within the meaning of Article 63 of the Service Regulations, until she underwent the examination. Her salary was subsequently withheld with retroactive effect to 30 May 1998. On 16 June a representative from the Remuneration Department wrote to her, informing her that she would need to pay her own and the EPO's contributions to the social security schemes and pension scheme or her affiliation to the schemes would cease. On 21 June 1998 she appealed against the decisions of 8 and 16 June. Her appeal was registered as RI/71/98.

During the internal appeal procedure the Administration admitted that its reference to "unauthorised absence" under Article 63 of the Service Regulations was "incorrect" and consequently so was the withholding of her salary. It stated that her salary would be paid retroactively in the event that the Invalidity Committee concluded the complainant was unfit for work. The Appeals Committee recommended that the decisions of 8 and 16 June 1998 be quashed, and that the complainant be paid arrears of salary including interest as well as the portion paid by the Office to the social security schemes and the pension scheme on her behalf, and that she be reimbursed for her legal costs. It recommended rejecting all other claims. The President of the Office endorsed these recommendations and so informed the complainant on 17 August 1999. That is the impugned decision.

The Invalidity Committee determined subsequently that the complainant was unfit for work and granted her an invalidity pension with effect from 1 August 1999.

B. The complainant impugns the President's decision of 17 August insofar as he refused to award her damages which she had claimed in her internal appeal. She submits that he based his decision on the Appeals Committee's opinion that she herself had brought the situation about; however, she contends that it would have been unfair to have her relinquish her rights to "protect" the EPO from the repercussions of its illegal action.

She says that the manner in which the third member of the Invalidity Committee was nominated was in breach of the Service Regulations. The EPO was well aware that she doubted the legality of this physician's nomination to the Invalidity Committee and, rather than convince her otherwise, it chose instead to withhold her salary and exclude her from the social security schemes in an effort to force her to give up her request for clarification about the legality of the nomination. It did not fulfil its duty of care towards her.

She takes issue with the fact that she was asked to undergo an examination by Dr H. when the legality of his nomination on the Committee had not been checked. Contrary to what the Organisation claims, she was injured by its actions. The state of her health worsened and she had to stop taking some of her medications because her medical expenses were not reimbursed. She asks for oral proceedings.

She seeks "reasonable damages" of "no less than" 2,000 German marks plus 8 per cent interest a year from the date of filing her complaint, and costs.

C. In its reply the EPO challenges the complainant's version of the facts. It considers the complainant's main claim to be for an award of damages and asserts that it will address only that issue.

Since the Invalidity Committee has granted the complainant an invalidity pension the claims in her appeal, except the one for an award of damages, have became obsolete. The Organisation submits that according to the Tribunal's case law an award for damages is subject to the existence of an unlawful act and consequent injury. Even if it could be concluded that the Organisation's acts were unlawful, the complainant has not suffered any injury as she was paid retroactively for the full salary. It sees no justification for holding oral proceedings in the context of this complaint and asks the Tribunal to find the complaint unfounded.

As for the complainant's argument that the nomination of the Invalidity Committee's third member was illegal, the EPO contends that the actions it took were necessary to break the deadlock. It submits that asking the Medical Advisory Board of the State of Bavaria to nominate the third member was compatible with the rules of comparable international organisations and the European case law.

D. In her rejoinder the complainant asserts that the crucial issue in her complaint is whether her misgivings about the lawfulness of the Invalidity Committee's composition were justified. She maintains that the decisions of 8 and 16 June 1998 were unlawful acts; it is precisely for this reason that the Administration later withdrew them. Furthermore, she was injured by the decisions. Her salary had been withheld for nine months; this caused her financial hardship and a great deal of stress.

E. In its surrejoinder the Organisation reiterates that the complaint arises out of an appeal in which the complainant requested the quashing of the decisions of 8 and 16 June; effectively this has been done as she has been paid the salary withheld and reinstated into the social security schemes. Not having proved that she has suffered any injury her claim to damages is unfounded. In this regard, it points out that the Appeals Committee unanimously concluded that there was no merit to an award of damages. In fact, her lack of cooperation has hampered the resolution of her disputes with the EPO.

CONSIDERATIONS

1. The complainant impugns a decision of the President of the European Patent Office which endorsed the Appeals Committee's recommendations in appeal RI/71/98 which, inter alia, rejected that part of her claim which sought damages.

2. In 1996, as she was nearing the maximum amount of sick leave allowable under Article 62 of the Service Regulations, the Office started the procedure to convene an Invalidity Committee. One physician was nominated by the complainant and another one by the EPO. However, since the parties could not agree on the nomination of the third physician on the Committee there was some delay in appointing that member. On 11 May 1998 the EPO informed the complainant and the two members of the Committee of the designation of Dr H., a psychiatrist and neurologist, as the third physician on the Committee, following the recommendation of the Medical Advisory Board of the State of Bavaria ("*Bayerische Landesärztekammer*") which had been consulted by the EPO. By a letter of 12 May 1998 Dr H. invited the complainant to attend an examination on 29 May. The complainant appealed to the President of the Office on 17 May 1998, alleging that the constitution of the Invalidity Committee was not in conformity with the Service Regulations. Her request was referred to the Appeals Committee as appeal RI/43/98. The complainant informed Dr H. on 25 May 1998 that she would not be attending the consultation, as his designation to the Invalidity Committee "seemed not to be in conformity with the Service Regulations".

3. On 8 June 1998 the EPO declared that the complainant's absence from work would be regarded as "unauthorised" within the meaning of Article 63 of the Service Regulations until she had attended the required examination. Her salary was subsequently withheld. By a letter of 16 June the EPO told her that besides her own contributions to the social security schemes and pension scheme she would have to pay those normally paid on her behalf by the Organisation, otherwise her affiliation to the schemes would cease. On 21 June 1998 the complainant asked the President to reconsider the decisions of 8 and 16 June. She also requested, inter alia,

the payment of damages. The matter was referred to the Appeals Committee as appeal RI/71/98. In July 1998 her affiliation to the schemes was interrupted.

4. On 9 December 1998 the EPO informed the complainant of the decision to reinstate her as a participant in the social security schemes with retroactive effect. In December 1998 the complainant informed the EPO that she would attend an examination by Dr H. During the oral proceedings which took place before the Appeals Committee on 5 May 1999, the EPO withdrew its decisions declaring the complainant's absence as unauthorised and withholding her salary. The complainant also withdrew appeal RI/43/98.

5. On 18 June 1999 the Appeals Committee unanimously recommended setting aside the decisions of 8 and 16 June 1998 as it found the statement of unauthorised absence from service unlawful. It recommended that the complainant be paid arrears of salary including interest as well as the sums representing the Office's contributions to the social security schemes and the pension scheme in accordance with Article 62(10), to refund to the complainant the procedure-related costs including her legal costs and to reject the claim for damages on the grounds that the complainant caused the EPO's reactions by her refusal to undergo an examination by Dr H.

6. On 17 August 1999 the President endorsed the recommendations of the Committee and agreed to award the complainant costs for the appeal. He rejected her claim for damages. That is the impugned decision.

7. The complainant is seeking an order:

(1) awarding her "reasonable damages" of an amount "no less than" 2,000 German marks together with interest at the rate of 8 per cent per annum since the filing of the complaint;

(2) awarding her costs to the actually incurred amount of the related expenses of the proceedings.

8. No doubt the complainant's case was mishandled by the EPO. Its decisions to declare her absence as "unauthorised", to withhold her salary and to demand payment of contributions to the social security schemes, were declared unlawful by the EPO itself and it took the necessary measures to remedy the situation. Accordingly, the complainant did get her retroactive salary, was reinstituted into the social security schemes, and got her legal costs. Her complaint relates exclusively to the fact that she was not awarded damages.

9. However, the complainant was not entirely blameless. Once it was clear that there was a stalemate in the process for appointing the third member of the Invalidity Committee it was obvious that some solution had to be found. The Service Regulations were, at the material time, silent on the subject (a defect which has since been remedied) but virtually all codes of arbitration, both legislative and private, contain a procedure for having a court or other impartial third party appoint a third arbitrator in the case of deadlock. Once it had become clear that no third member could be appointed in the case at bar, it was entirely reasonable for the EPO to proceed by analogy to such codes. Both parties have now correctly retreated from their initial extreme positions.

As regards the complainant's claim for not less than 2,000 German marks, the Tribunal considers that she is entitled to 1,000 marks in moral damages for the unlawful actions of the EPO. She is also entitled to an award of costs which is set at 500 euros.

DECISION

For the above reasons,

1. The complaint is allowed.
2. The EPO shall pay the complainant 1,000 German marks in moral damages.
3. It shall pay her 500 Euros in costs.

In witness of this judgment, adopted on 27 April 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

Michel Gentot

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

James K Hugessen

JAMES K. HUGESSEN

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL
GENEVA

CATHERINE COMTET

NINETY-FIRST SESSION

***In re* Müller-Engelmann (No. 13)** **Judgment No. 2047**

THE ADMINISTRATIVE TRIBUNAL,

Considering the thirteenth complaint filed by Mrs Jutta Müller-Engelmann against the European Patent Organisation (EPO) on 24 June 2000 and corrected on 11 July, the EPO's reply of 6 October 2000, the complainant's rejoinder of 4 January 2001, and the Organisation's surrejoinder of 9 March 2001;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for the hearing of witnesses;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Some facts relevant to this case are set out in Judgment 1829 on the complainant's first complaint. She was granted an invalidity pension with effect from 1 August 1999.

On 20 June 1996 the complainant wrote to Van Breda – the insurance brokers who are responsible for the day-to-day handling of the collective insurance contract concluded by the EPO – to request authorisation for "in-patient detoxification treatment". On 24 June Van Breda requested more detailed information, such as the exact toxicological symptoms and a description of the treatment planned. On 15 July the complainant replied that her request could be disregarded for the time being; nevertheless, Van Breda continued to request this information.

On 12 September she submitted a "claim for reimbursement of medical expenses". One of the amounts claimed was for 1,873.09 German marks. It was supported by a statement dated 14 August, showing that she had paid a deposit of 800 marks for treatment, and an invoice dated 3 September for 1,073.09 marks. The diagnosis as indicated on this invoice was "[exposure] to solvents, detoxification problems of the liver". In a settlement statement of 20 September Van Breda informed the complainant that that amount would not be reimbursed as it was waiting for additional information from her doctor, whom it had contacted directly. On 6 November the doctor concerned sent Van Breda copies of medical reports on the complainant. Van Breda informed the complainant on 16 December 1996 that, after consulting a specialist in clinical biology, its medical adviser had decided that there was "no medical indication present for the performed laboratory tests" which were part of the invoice.

The complainant wrote to the President of the European Patent Office on 6 January 1997 requesting that the Office instruct Van Breda to reimburse her for the disputed expenses plus interest; in the event that he was unable to grant her request, she asked him to consider her letter as lodging an appeal. On 12 February the Director of Personnel Development informed her on the President's behalf that her request could not be granted; it had, therefore, been forwarded to the Appeals Committee as appeal RI/8/97.

By letters to the EPO of 13 June 1997, 2 November 1998 and 3 December 1998 the complainant asked on what grounds her claim for reimbursement had been rejected. Van Breda provided this information to the EPO in a letter of 30 April 1999. On 14 May 1999 the Director of Personnel Development informed the complainant in writing that the reimbursement was refused because Van Breda's medical adviser had determined that the anamnesis given could not warrant the tests in question. He added that the Office considered the issue in her internal appeal to be a medical one and told her that she could submit it to an Invalidity Committee pursuant to Article 90(1) of the Service Regulations for Permanent Employees of the European Patent Office.

In its opinion of 15 February 2000 the Appeals Committee unanimously recommended that the items other than the disputed laboratory tests be reimbursed and that the EPO medical officer's opinion be sought regarding the necessity of the tests performed. It also took the view that Van Breda's medical adviser cannot be regarded as the Office's medical officer in this matter. It considered the complainant's request that the Administration provide her with additional medical documentation, to be unjustified. On 30 March 2000 the President of the Office rejected her claims except those for the reimbursement of medical expenses not related to the laboratory tests. He also informed her that "in accordance with standing practice", Van Breda's medical adviser may act as medical officer within the meaning of Article 90(1) of the Service Regulations. That is the impugned decision.

On 10 April 2000 the sum of 278.28 marks plus 8 per cent interest was paid into her account.

B. The complainant asserts that under the collective insurance contract she has no direct recourse against Van Breda and therefore can only turn to the President of the Office for relief in case of disagreement. The President, in his capacity as her "insurer", has a duty of care; therefore, he should represent her interests, and under Article 83 of the Service Regulations, ensure that medical costs are reimbursed. She claims that there was no justification, either legally or medically, to refuse to reimburse the disputed amount.

She submits that Van Breda's medical adviser is not the same as the medical officer provided for under Article 90(1) of the Service Regulations. She alleges that the Administration agreed on this during the oral proceedings held on 1 February 2000 and that the same conclusion can be drawn from the collective insurance contract. In fact, Van Breda's medical adviser represents the interests of the insurance companies, whereas the President of the Office appoints a medical officer to represent him vis-à-vis staff members. The President's decision to reject her claim is unjustified since it was taken without review by a medical officer appointed by the EPO. It is only after she has the opinion of the EPO's medical officer that she can ask for the convening of an Invalidity Committee.

She also argues breach of her right of access to all medical documents concerning her in connection with the disputed invoice, as well as of her right of "informational self-determination". She contends that the President, as her insurer, has an obligation to make available to her any documents that have a bearing on decisions taken against her. She points to paragraph 6 of Article 32 of the Service Regulations, on personal files, to justify her position.

She asks the Tribunal: (1) to quash the President's decision of 30 March 2000 insofar as it rejected the claims in her appeal; (2) to order the EPO "to pay the medical expenses" amounting to 1,873.09 marks, including interest, less the amount reimbursed on 10 April 2000, or subsidiarily, to provide her with the opinion of the EPO medical officer on the necessity of conducting laboratory tests, pursuant to Article 90(1); (3) to order the EPO to provide her with Van Breda's reasons for refusing to reimburse the cost of the laboratory tests and to supply "the medical reports and the medical assessment of Van Breda's medical adviser, on the basis of which the decision was taken"; and (4) to award her legal costs for the proceedings before the Appeals Committee and the Tribunal.

C. The Organisation replies that the complaint is irreceivable because the internal appeal was irreceivable. The issue at stake is a medical one and therefore it is the Invalidity Committee and not the Appeals Committee that has competence over the matter. Furthermore, her claim requesting the reasons why the laboratory costs could not be reimbursed is irreceivable because she did not put this claim forward in her appeal.

Subsidiarily, the complaint is unfounded. Because of the relationship the Office has with Van Breda, the latter's medical adviser acts in lieu of the Office's medical officer regarding the processing of claims for reimbursement; the EPO points out that this view does not contravene Article 90(1) of the Service Regulations. Consequently, it considers it reasonable to endorse the medical opinions issued by Van Breda's medical adviser on the reimbursement of claims. It asserts, contrary to what the complainant argues, that the representatives of the Administration expressed this view during the hearings on her internal appeal. Only when the Office has doubts concerning the opinion of Van Breda's medical adviser will the

Office ask its own medical officer for an opinion, and there is nothing in the complainant's file to indicate that it had any doubts about the medical adviser's opinion. It would, therefore, have been superfluous to seek the opinion of the EPO's medical officer before convening an Invalidity Committee.

The EPO argues that Van Breda has provided the complainant with sufficient reasons as to why it is refusing to reimburse the laboratory expenses in question. It considers her claim to have access to all documents concerning her as unfounded. Van Breda collected all information connected with her claim in a manner that was transparent and fair. The EPO is not entitled to any documents covered by medical secrecy, so it is not in a position to give them to the complainant. However, the complainant can obtain information by asking her doctors for copies of reports sent by them to Van Breda.

The EPO asks the Tribunal to find her claim for legal costs unfounded. She has only herself to blame for the delay in handling her case. Her representatives were informed at the hearing for the internal appeal that the Appeals Committee could only decide on legal issues and that the complainant would need to convene an Invalidity Committee for any medical dispute; they were then asked if they wished to continue with the appeal procedure or to convene an Invalidity Committee, but they maintained the appeal.

D. In her rejoinder the complainant contends that she has been unable to have the Invalidity Committee convened, as suggested by the EPO, because the conditions of Article 90(1) have not been met. The medical opinion that she contests is that of Van Breda's medical adviser, not the EPO's; therefore Article 90(1) cannot yet be applied.

Her complaint is not based on medical arguments but legal ones. A medical argument would be something based on whether or not the laboratory tests were medically necessary. But she has been asking for proof that there were sufficient reasons to reject her medical reimbursement claims and whether Van Breda's medical adviser can be considered as the Office's medical officer under Article 90(1).

She expands on her plea that she has a legal right to all documents that the EPO and Van Breda have on her and that it is the duty of the Office to ensure that she receives them. She cites several articles from the Service Regulations in support of this plea.

E. In its surrejoinder the Organisation withdraws its objections to receivability and asks instead that the Tribunal provide an interpretation of Article 90(1). It contends that an opinion expressed by Van Breda's medical adviser in the context of an assessment of a claim for reimbursement can be considered as an opinion expressed by the Office's medical officer under the Service Regulations. The EPO submits that this is not a conflict of interest as asserted by the complainant. The Tribunal's definitive ruling on this issue should help break the deadlock with the complainant over whether an Invalidity Committee should be convened.

Concerning the complainant's other claims, the Organisation considers that she has been given sufficient information from Van Breda as to why her medical reimbursement claims were denied, and there is no basis for her request for access to the documents relevant to Van Breda's decision.

Finally, regarding her claim for costs, the EPO asks that the claim for costs for the complaint be rejected and that the claim for costs for the internal appeals procedure be settled once the Office's medical officer, or the Invalidity Committee, has issued an opinion. It also makes a counterclaim for costs which it feels is justified by the fact that the complainant's lengthy rejoinder and other complaints have caused an excessive amount of work for the Organisation's language and legal services.

CONSIDERATIONS

1. The complainant attacks a decision of the President of the European Patent Office of 30 March 2000 which endorsed the Appeals Committee's finding in internal appeal RI/8/97 that the complainant's request for additional medical documentation was unjustified. The President did not endorse that part of the Committee's report which would have

required the EPO to appoint its own medical officer to assess the complainant's claim independently of Van Breda's medical adviser.

2. On 20 June 1996 the complainant requested authorisation from Van Breda for "in-patient detoxification treatment". On 24 June Van Breda asked her to provide more detailed information to their medical adviser, such as the exact toxicological symptoms and a description of the treatment planned. On 12 September she filed a claim for reimbursement of medical expenses, including a claim for 1,873.09 German marks corresponding to a deposit of 800 marks and an invoice of 1,073.05 marks. On 16 December 1996 Van Breda communicated the following to her:

> "We refer to the correspondence maintained with you and [your doctor] ...
> After consulting a specialist in clinical biology, our medical adviser informed us that his approval as to the reimbursement of the expenses amounting to DEM 1073.09 cannot be granted, as there is no medical indication present for the performed laboratory tests."

3. On 6 January 1997 the complainant wrote to the President wanting the EPO to reimburse the unpaid sums plus interest. In the event that her request would not be granted, her letter was to be considered as an internal appeal. On 12 February 1997 the EPO rejected the complainant's request.

4. On 13 June 1997, 2 November 1998 and 3 December 1998 the complainant requested the EPO to inform her of the grounds of rejection. On 30 April 1999 Van Breda informed the EPO that its "medical adviser did not grant his approval as to the reimbursement of the laboratory expenses amounting to DEM 1 073.09 as the anamnesis mentioned on the bill in question does not justify the performed laboratory tests. ... Hence, there was no medical indication present for the specific laboratory tests performed".

5. On 14 May 1999 the Director of Personnel Development informed the complainant of Van Breda's reason for rejecting her request. He said that the Office considered the issue to be a medical one, coming under Article 90 of the Service Regulations and, therefore, she could submit her case to an Invalidity Committee.

6. On 15 February 2000 the Appeals Committee unanimously recommended that the items other than the disputed laboratory tests be reimbursed and that the EPO's medical officer's opinion had to be sought regarding the necessity of the laboratory tests. The Committee declared the complainant's request for additional medical documentation unjustified. The "relevant medical reports", written by her doctors could be submitted for a report by the medical officer. This would also apply to the expert opinions of Van Breda's medical adviser.

7. On 30 March 2000 the President of the Office rejected the complainant's claims with the exception of her claim for reimbursement of expenses other than the disputed laboratory tests. That is the impugned decision.

8. The complainant asks the Tribunal:

(1) to set aside the decision of 30 March 2000 insofar as the EPO rejected the complainant's claims in her internal appeal;

(2) to order the EPO "to pay the medical expenses" amounting to 1,873.09 marks including interest at 14 per cent per annum, backdated to 30 September 1996, less 357.94 marks reimbursed with the settlement note of 10 April 2000;

or subsidiarily: to order the EPO to provide the complainant with the opinion of the EPO's medical officer regarding the necessity of conducting laboratory tests under Article 90(1) of the Service Regulations;

(3) to order the EPO to provide the complainant with Van Breda's grounds for refusing to reimburse the cost of laboratory tests and to supply "the medical reports and the medical assessment of Van Breda's medical adviser, on the basis of which the decision was taken"; and

(4) to award the complainant costs for the legal expenses "actually incurred" in connection with proceedings before the Appeals Committee and the Tribunal.

9. The EPO now concedes that the complaint is receivable notwithstanding its earlier argument that her appeal was irreceivable before

the Appeals Committee and therefore irreceivable before this Tribunal because only the Invalidity Committee has jurisdiction to deal with it. The opinion of the Appeals Committee turned largely on its interpretation of the terms of Article 90 of the Service Regulations, and the correctness of that view is one of the principal issues before the Tribunal. This is a purely legal issue, and whether or not the medical opinion is founded was, and is, irrelevant to it.

10. Article 90 reads as follows:

> "(1) The Invalidity Committee shall be responsible for determining action to be taken at the expiry of the maximum period of sick leave provided for in Article 62, paragraph 6, of these Regulations, and for determining, for the purposes of these Regulations and of the Pension Scheme Regulations, whether a permanent employee is suffering from permanent invalidity which prevents him from performing the duties attaching to his employment at the Office.
>
> It shall also be competent to decide upon all disputes relating to medical opinions expressed for the purposes of these Service Regulations, on the one hand, by the medical officer designated by the President of the Office and, on the other, by the permanent employee concerned or his medical practitioner.
>
> (2) Cases shall be submitted to the Invalidity Committee either on the initiative of the President of the Office or at the request of the permanent employee concerned."

11. The complainant adopts the position taken by the Appeals Committee to the effect that the EPO was obligated to appoint its own medical officer for the purposes of dealing with her claim and was not entitled to rely on the medical adviser appointed by Van Breda for that purpose. For the Tribunal to so hold would amount to a denial of the Organisation's right to appoint the medical officer of its choice. The fact that it selects and relies on the same medical adviser as the one appointed by the insurer, whom it has engaged to carry out its obligations to provide health coverage to its staff, is not in the least surprising. Such appointment cannot have any adverse effect upon the complainant who retains the right given by Article 90 to have any contested issue relating to medical matters determined by the Invalidity Committee. The terms of Article 6 of the collective insurance contract, which contains a somewhat similar provision for dealing with disagreements on medical matters as between the parties to that contract, namely the Organisation and the Insurer, are of no concern to

the complainant and do not contradict or vary the terms of the Service Regulations. The Organisation is no doubt entitled, if it so chooses, to appoint a different medical officer and, in the event of disagreement, to have recourse to the provisions of Article 6. The Committee erred in its view of this question.

12. The complainant also claims that Van Breda did not give her sufficient reasons for refusing her claim for reimbursement. It is enough to read the terms of the letter sent to the complainant to know that the reason for such refusal was that there was no medical indication for the laboratory tests. That is quite enough.

13. With regard to the complainant's claim to be provided with copies of any medical reports relied upon by Van Breda, it is trite law that a staff member's right to see medical reports may not ordinarily be challenged. As such, the complainant should be provided with copies of medical reports contained in Van Breda's file relating to this matter. Whether or not the EPO has these documents in their possession is irrelevant. As the policy holder, it has the right to give instructions that the complainant be given access to these documents and must ensure that she is provided with the information as soon as reasonably possible. It would appear that the only reason that the Appeals Committee did not recommend such relief was that it thought it would be provided in any event through the medical officer who, it had wrongly felt, had to be consulted. It is of no avail that some or all of the reports in question may have been given by the complainant's own doctors: she is entitled to know from Van Breda exactly what medical information about her it has received and from whom. This disposes of the subsidiary claim mentioned under 8, in sub-paragraph 2, as well as of the primary claim in sub-paragraph 3.

14. Whether Van Breda's refusal of the complainant's claim on its merits is valid or not is a medical issue that can only be addressed by the Invalidity Committee. This disposes of her primary claim mentioned under 8, sub-paragraph 2.

15. The complainant having enjoyed a limited measure of success, she is entitled to her costs incurred before the Tribunal in the amount of 500 euros.

DECISION

For the above reasons,

1. The EPO is ordered to provide the complainant with access to any medical reports in Van Breda's file.
2. The complaint being allowed in part the complainant is entitled to costs incurred before the Tribunal in the amount of 500 euros.
3. The Organisation's counterclaim is dismissed.
4. All other claims are dismissed.

In witness of this judgment, adopted on 27 April 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

James

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANIZATION ADMINISTRATIVE TRIBUNAL GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

NINETY-FIRST SESSION

***In re* Lunianga** **Judgment No. 2048**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Dieudonne Ali Lunianga against the Food and Agriculture Organization of the United Nations (FAO) on 19 June 2000 and corrected on 31 July, the FAO's reply of 10 November 2000, the complainant's rejoinder of 26 February 2001 and the Organization's surrejoinder of 17 April 2001;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant was born in 1955 in Zaire and has Canadian nationality. On 9 November 1992 he joined the World Food Programme (WFP) which is an autonomous joint subsidiary programme of both the United Nations and the FAO. He was assigned to the Programme's Sub-Office at Mazar-e-Sharif in Afghanistan as an emergency officer at grade P.3 on a fixed-term appointment which was renewed several times. On the departure of the Head of the Sub-Office, he acted as Officer-in-charge there from 20 May to 29 July 1996. He was transferred to Mozambique with effect from 1 August 1996 and his appointment was extended to 31 July 1997.

On 25 August 1996 a new Head was appointed at the Sub-Office. That official wrote to the Country Office for Afghanistan reporting on certain aspects of the complainant's management while he had been in charge, particularly regarding the "food for work" projects for which the complainant had been responsible. He considered that the complainant had approved an excessive number of such projects. Rumours of the allegations being made against him reached the complainant in Mozambique. Holding the Head of the Sub-Office in Mazar-e-Sharif responsible, he sent him a strongly-worded letter dated 7 October 1996. The letter was perceived to have a threatening tone and led to an official investigation into the complainant's conduct by the Office of Investigation and Inspection (hereinafter "OEDI"). As a result, the complainant was summoned to a meeting at the end of January 1997 in the Afghanistan Country Office. He was questioned by the Director of the OEDI and two other officials over a two-day period, from 26 to 27 January 1997. Their discussion was recorded and transcribed. The investigators concluded that the allegations against the complainant had not been proved. The letter of 7 October was discussed during the interview and the complainant subsequently sent letters of apology to the officials concerned.

On 22 February 1997 a British daily newspaper published an article about problems with food-aid projects in Afghanistan. It was entitled "Food aid goes astray" and reported on the way a WFP employee had allegedly mismanaged "food-for-work" programmes. Although the article did not name the complainant, he was identifiable from the way it was worded.

The Director of Human Resources of the WFP wrote to the complainant on 14 April 1997. He referred to the letter of 7 October sent by the complainant to the Head of the Sub-Office, at Mazar-e-Sharif and said that he considered "the writing of a threatening letter to a colleague [to be] unacceptable conduct by an International Civil Servant"; consequently his contract, which was due to expire at the end of July 1997, would not be renewed.

In a letter of 2 June 1997 the complainant appealed to the Executive Director of the WFP against the non-renewal of his contract. In his appeal he referred to the publication of the newspaper article and said he was "intentionally defamed" by a senior WFP official. By a letter of 28 July

1997 the Executive Director rejected his appeal. She also mentioned that the newspaper article was not based on information supplied by WFP officials and that the Programme had protested to the newspaper concerned.

On 1 December 1997 the complainant lodged an appeal with the FAO Appeals Committee. In its report of 16 December 1999 the Committee found that, in view of the type of appointment he had, it was not necessary to give reasons for non-renewal. Although it noted that the reason given – unacceptable conduct – was not substantiated, it nevertheless recommended rejecting his appeal as unfounded. In a letter of 1 March 2000 the Director-General of the FAO endorsed that recommendation, which is the decision the complainant impugns.

B. Citing the Tribunal's case law, the complainant argues that the Organization is required to give reasons for the non-renewal of his contract. The burden of proof for establishing the reasons is on the Organization. The sole reason given was his "unacceptable conduct" in writing the "threatening" letter to the official in Afghanistan, and yet the Appeals Committee had found that that reason was not substantiated. In his view the Organization wrongly interpreted the letter: he did not threaten physical harm therein, he merely threatened that he would take legal action. Moreover, the OEDI investigation team found that there was no substantiation of misconduct. Therefore, he sees no justification for not renewing his contract.

The article in the newspaper was a source of embarrassment to him and constituted defamation. He was identifiable in the article and it is clear that the information was leaked to the newspaper by a "knowledgeable person" with a view to placing him in an "embarrassing light". The WFP has to "bear the consequences" of the actions of those responsible. Citing Judgment 361 (*in re* Schofield) he contends that the Administration has a duty of care towards officials with regard to "their dignity and reputation and shall not cause them unnecessarily personal distress". In allowing the information to reach the newspaper, the WFP failed in its duty of care towards him.

He seeks the quashing of the impugned decision, reinstatement, interest on back pay due to him, moral damages in an amount of 100,000 United States dollars and costs.

C. In its reply the Organization submits that the complainant was separated from service upon the expiry of his fixed-term appointment in accordance with Staff Rule 302.907 and paragraph 305.5123 of the FAO's Administrative Manual. Under both those provisions, fixed-term appointments expire automatically and no notice is necessary; they were incorporated into the terms and conditions governing his appointment, and he accepted them by signing his letter of appointment. Even so, the complainant was given three months' notice and he was informed of the Organization's valid reasons for not renewing his contract. The complainant had "fallen below" the standards applicable to an international civil servant, and had proved himself to be unsuitable for further service with the Programme. He was given the opportunity to be heard before the impugned decision was taken.

In finding that there was not satisfactory proof of the allegations against the complainant, the investigation team was only referring to the allegations in relation to his work. The team's conclusion was not referring to the letter that the complainant had written to the official in Afghanistan. It is an undisputed fact that he wrote it. A "reasonable reading" of the letter leads to the conclusion that there was a menacing tone throughout it.

The Organization considers his claim for moral damages "for defamation and embarrassment" irreceivable; the complainant has not challenged an administrative decision on this matter and therefore has failed to exhaust the internal means of redress in a timely manner. The non-renewal of his contract is in no way related to the publication of the newspaper article. Furthermore, the Organization cannot be held responsible for its publication. The complainant has not demonstrated that the personal distress he suffered arose from any administrative decision taken by an official of the Programme or indeed by any person linked to his case or to the matters discussed in the article. The article appeared in the press at a time when the Organization had cleared the complainant of charges of misconduct and therefore it would not have supplied the information to which he objects.

D. In his rejoinder the complainant contends that his claim to moral damages for defamation is receivable. He submits that it follows from the case law that, if the impugned decision is held to be illegal, then the surrounding circumstances can "influence the remedy". He notes that no written communication between the WFP and the newspaper office has been produced, and concludes that the WFP defended him in an informal and inadequate way.

He takes issue with the Appeals Committee's view that reasons for non-renewal do not have to be given. That is, he says, clearly contrary to the case law of the Tribunal, which is based on general principles of law and therefore overrules the provisions of the staff regulations.

He believes that in clearing him of "misconduct" the investigation team was also clearing him of misconduct with respect to his letter to the new Head of the Sub-Office. It is clear from the transcript of the investigation interview that the letter was an integral part of the discussion.

E. In its surrejoinder the Organization insists that it was clear from the overall tone of the letter that it contained far more than threats of legal action and invites the Tribunal to consider the letter in its entirety. It points out that non-renewal of the complainant's contract did not constitute a disciplinary measure within the meaning of the Administrative Manual. It chose not to renew his contract for reasons of unsuitability for service and put its decision into effect with due regard for relevant rules and the case law of the Tribunal.

It rebuts the complainant's allegations about the way it dealt with the newspaper article and reiterates that there is no causal link between the decision of non-renewal of his contract and the fact that the article appeared in the press.

CONSIDERATIONS

1. The complainant was recruited by the World Food Programme on 9 November 1992 as an emergency officer at grade P.3 at Mazar-e-Sharif in Afghanistan. Before a transfer to Mozambique, which took effect in August 1996 he acted as Officer-in-charge of the Sub-Office at Mazar-e-Sharif from 20 May to 29 July 1996.

2. On 25 August 1996 a new Head of the Sub-Office at Mazar-e-Sharif was appointed. He subsequently wrote a report to the Country Office for Afghanistan on the management of the Sub-Office by the complainant. He reported that an excessive number of "food for work" projects had been approved by the complainant and that projects were poorly managed.

3. On 7 October 1996 the complainant wrote to the Head of the Sub-Office (whom he had never met) in the following terms:

> "Dear colleague,
>
> I heard that you are on a campaign against my reputation and my career. If this is true, I wonder why would you wish to create a powerful enemy like me. You must be ill-advised as you are underestimating my ability to counter-react.
>
> You should ask yourself: Why do you need to antagonize Ali? What will you gain by bad-mouthing Ali? Who are you to judge Ali's work? What could be the result of a confrontation with someone you had never met and who can be a very good or a very bad person? By your vicious allegations against me, how many personal friends you could annoy in a dangerous place such as Afghanistan?
>
> I am still awaiting the conclusive evidences of your investigative report. Probably, I will not respond to it but be certain that if you are not careful I will sue you for misrepresentation and defamation. Further, if you do not stop your innuendoes right away, more unpleasant confrontations may have to follow. I am warning you as I do not want an unnecessary bloody contest. Please advise also [X] to refrain from unfounded insinuations.
>
> You could build your own kingdom without questioning my integrity. You could reduce or change the orientation of the programme without insulting me. Please concentrate on doing your job rather than criticizing someone who has already left the Afghan Programme.
>
> Kindly please be wise and don't start a devastating war you can never win. And if you are of those who think that anyone from the Third World must be corrupted then you are wrong and you should quickly readjust your thinking.
>
> I hope you can avoid this nasty struggle.
>
> Truly,"

4. When WFP headquarters received a copy of this letter, the Head of the Sub-Office at Mazar-e-Sharif was ordered to leave his duty station in mid-November 1996 for his own safety and he was then sent to another duty station on 31 January 1997. The Organization considers security a major problem in Mazar-e-Sharif and that it is extremely difficult for local authorities to provide a secure environment for United Nations personnel. In that region militia and citizens are heavily armed.

5. The Office of Investigation and Inspection (OEDI) carried out an investigation into the allegations against the complainant and the letter of 7 October 1996. An enquiry was held over two days, on 26 and 27 January 1997. It took the form of an interview with the complainant; present at the interview were the Director of OEDI and two other officials. Prior to commencement, the complainant was given an opportunity to reply in writing to a series of questions. The complainant denied all the allegations.

6. In summing up the interview the Director of OEDI said it had been primarily concerned with ascertaining whether the complainant obtained personal benefit from any of his work with the WFP in terms of receiving bribes or selling food and receiving money. He said none of the allegations had been proved to their satisfaction and they accepted the complainant's total denial of them. He said there would not be a lengthy report and no disciplinary action would be taken against the complainant.

7. Referring to the letter, the Director said it was not the professional behaviour expected of an international civil servant. More specifically, he stated: "We do not expect you to be writing threatening letters to people, particularly when they're in a war zone, and ... you've been there for a long time and you claim to have a lot of friends who can be very dangerous, and you claim to be a very dangerous person yourself. ... I think all of us thought it was pretty threatening when we saw it".

8. On 28 January 1997 the complainant wrote letters of apology to the Head of the Sub-Office at Mazar-e-Sharif and the other person mentioned in the letter.

9. The substance of the interview was reviewed at WFP headquarters and on 14 April 1997 the WFP's Director of Human Resources wrote to the complainant to say that writing a threatening letter to a colleague constituted unacceptable conduct by an international civil servant and that his fixed-term appointment, due to expire on 31 July 1997, would not be renewed.

10. On 2 June 1997 the complainant lodged an appeal with the Executive Director of the WFP against the non-renewal of his contract. He also mentioned an article published in a British daily newspaper on 22 February 1997 which he alleged defamed him. His appeal was rejected as unfounded by the Executive Director on 28 July 1997. The complainant then appealed to the FAO's Appeals Committee on 1 December 1997 and the Committee reported on 16 December 1999. It too recommended that the appeal be rejected as unfounded.

11. By letter dated 1 March 2000 the Director-General of the FAO, concurred with the recommendation and dismissed the appeal. This is the decision impugned.

12. In this case the complainant received three months' notice in advance that his contract would not be renewed. The reason given was that the writing of a threatening letter to a colleague was unacceptable conduct by an international civil servant.

13. The decision not to renew a contract is a discretionary one reviewable only on limited grounds. The complainant argues that the Organization must give reasons for non-renewal and the burden of proof lies with the Organization. The complainant claims the letter was not physically threatening; it only threatened a lawsuit. He analysed the letter line by line seeking to prove that it was not threatening.

14. The letter has been reproduced in full in consideration 3. In the opinion of the Tribunal, the letter speaks for itself. To send such a letter to what was in reality a war zone, where the complainant had spent nearly four years and made many contacts, could be interpreted as threatening and the

Organization was justified in so treating it. Even if the complainant wrote it in the grip of emotion, this still did not excuse his behaviour.

15. In the opinion of the Tribunal the reason given for not renewing the complainant's contract stands up to examination. There are no grounds for quashing the decision. Since the decision not to renew the contract stands, any claim for consequential relief fails.

16. The allegations of defamation by the complainant in connection with publication of the newspaper article were not directed against an administrative decision challenged by way of a letter of appeal to the Executive Director in compliance with Staff Regulation 301.111 and Staff Rule 303.1311. Nor was there a claim for moral damages. The claims of the complaint are irreceivable on that score on the grounds that the complainant failed to exhaust the internal means of redress.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 27 April 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

Flerida Ruth P. Romero

FLERIDA RUTH P. ROMERO

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative

NINETY-FIRST SESSION

***In re* Valitov** **Judgment No. 2049**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Roustem Valitov against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 1 August 2000 and corrected on 5 September, UNESCO's reply of 23 October 2000, the complainant's rejoinder of 4 February 2001 and the Organization's surrejoinder of 5 April 2001;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Russian citizen who was born in 1945, joined UNESCO in August 1983. At the material time he held a fixed-term appointment which was due to expire on 31 May 1996. In 1994 UNESCO terminated its "Science, Technology and Society" programme and the unit that ran it, with the result that the complainant's post was abolished as from 1 September 1995. The Director of the Bureau of Personnel so informed him officially in a memorandum of 7 July 1995, explaining that the Organization's efforts to find him another post had been unsuccessful. She offered him a separation from service by mutual agreement which would have the effect of increasing his termination indemnity by 50 per cent, on condition that he undertook not to challenge the decision to separate him before either the Appeals Board or the Tribunal. On 19 July the complainant asked the Director-General to intervene on his behalf and, on 7 August, submitted a written protest against the above decision. However, he did not follow up a notice of appeal he had sent to the Secretary of the Appeals Board on 6 October 1995 by a "detailed appeal" within one month, as required by Article 10 of the Board's Statutes.

Following an accident on 28 August 1995 the complainant was put on sick leave. On 11 October in answer to the complainant's request of 19 July for intervention the Assistant Director-General for Management and Administration informed him on the Director-General's behalf that the decision to separate him stood but that the abolition of his post would be postponed to take account of his absence on sick leave.

By a memorandum of 7 November 1995, the Director of Personnel again sent the complainant the decision to separate him as from 30 November and proposed conditions for a separation by mutual agreement. His sick leave having been extended until 17 December 1995, that memorandum was cancelled and replaced by another of 12 January 1996 in which the Director of Personnel confirmed the decision, this time with effect from 31 January, and renewed her proposal. On 29 January the complainant sent in a further medical certificate to the medical service. His sick leave was renewed several times. On 5 April the Chief Medical Officer, having reservations about a depression the complainant was now alleging, asked for an opinion by a medical expert. The expert found the complainant to be fit to resume work as from 13 June 1996.

By a memorandum of 28 June, the Director of Personnel again sent the complainant an offer of separation by mutual agreement as from 15 July 1996. As before, she set a date by which he was to accept. Failure to do so would be treated as a refusal of the offer. On 9 July she informed the complainant that, since he had not accepted the offer in time, the matter would be referred to the Senior Personnel Advisory Board. The following day the Secretary of the Board told him that his case would be heard on 22 July and that the Director of Personnel had accordingly decided to extend his appointment until 31 July. The complainant replied on 16 July that there had been a misunderstanding and that he agreed to the offer of separation by mutual agreement as from 31 July 1996. The Director of Personnel accepted his explanation but gave him until noon on 19 July to sign a memorandum setting out the arrangements for separation. The complainant signed the memorandum, dated 19 July 1996, and wrote on it by hand: "Read and approved – my acceptance is firm, final and irrevocable". The Advisory Board meeting was accordingly cancelled.

B. The complainant contends that the decision is flawed by a lack of consent, since he was not in possession of his mental faculties when he signed the offer of a negotiated separation. In subsidiary pleas he argues that it also shows formal flaws because UNESCO failed to comply with the procedure set in Article 9.1.1 of the Staff Regulations: a special advisory board should have examined his case. He asks the Tribunal to find that the memorandum of 19 July 1996 notifying the separation by mutual agreement to be flawed by lack of consent and therefore to "declare the said memorandum null and void", or else to find that UNESCO committed "a breach of process in terminating [his] appointment" and accordingly to "declare the said memorandum null and void".

C. In its reply UNESCO contends that the complaint is irreceivable because the complainant failed to exhaust the internal remedies, not having complied with the Statutes of the Appeals Board. Furthermore, it is now too late to challenge the agreement of 19 July 1996.

In subsidiary pleas the Organisation submits that the complainant was in full possession of his faculties when he signed the separation from service agreement mentioned above. He himself had asked for the agreement and negotiated the date of his separation. As to procedure, UNESCO points out that the complainant's appointment expired on 31 May 1996 (though it was extended on compassionate grounds), so his termination was not a dismissal but a non-renewal of his appointment. The Administration nonetheless decided to let him benefit from the separation by mutual agreement procedure so that he would receive a larger indemnity. There was no longer any reason for the Special Personnel Advisory Board to meet because the complainant had accepted the Organization's offer of separation. Lastly, UNESCO points out that by signing the agreement the complainant undertook not to challenge the negotiated separation either before the Appeals Board or the Tribunal.

D. The complainant rejoins that the Organization never supplied a job description and made no effort to find him another post. He accuses the Chief Medical Officer of influencing the medical expert, and concludes that the report declaring him to be fit for work as from 13 June 1996 was flawed.

On receivability, the complainant affirms that the separation agreement put an end to the proceedings before the Appeals Board. In any event the latter has no authority to quash a settlement; besides, there is no time limit for challenging settlements.

On the merits, he contends that UNESCO wittingly put him in a precarious financial situation – by suspending payment of his salary – so that he would have to sign the challenged agreement. That, compounded by his depression, led him to agree to a separation though he deemed it not only unjust, but vexatious as well. Consequently, UNESCO may not plead that he waived his right of appeal. In his submission, the non-renewal of his appointment can be construed as a dismissal, particularly at UNESCO where fixed-term contracts, which account for the great majority of appointments, are "systematically renewed".

The complainant enlarges on his claims. He asks for awards of 583,336.80 United States dollars to offset the loss of his salary until the age of retirement, 720,917 dollars in damages for wrongful dismissal, 100,000 dollars in moral damages and 10,000 dollars in costs.

E. In its surrejoinder UNESCO retorts that, though there should be an up-to-date description of duties for every post, the lack of one has no consequences for a decision to separate a staff member by mutual agreement. In addition, the complainant is barred from contesting the duties that had been assigned to him. The Chief Medical Officer gave information to the medical expert not to influence him but to help him accomplish his task.

UNESCO presses its pleas on receivability and adds that, on the basis of the complainant's reasoning in his rejoinder, the complaint is irreceivable because it does not challenge a decision as Article VII, paragraph 1, of the Tribunal's Statute requires.

On the merits, it points out that non-renewal of an appointment is at the Director-General's discretion. Lastly, the complainant has no grounds for alleging injury because his separation from the Organization is based on conditions that were mutually agreed. His claim to redress is therefore unfounded.

CONSIDERATIONS

1. The complainant joined UNESCO in 1983 and was working in the unit in charge of the "Science, Technology and Society" programme when it was abolished in 1994. He was seconded on 21 June 1994, with his post, to the Division of Policies and Sectoral Analysis in the Bureau for Relations with Extra-Budgetary Funding Sources. But it was decided that his post would be abolished as from 1 September 1995. By a memorandum of 7 July 1995 the Director of the Bureau of Personnel informed the complainant that it was unable to find a suitable alternative post. It offered him separation from service by mutual agreement under the conditions set in Staff Regulation 9.1.2 and Staff Rule 109.7(e). The complainant rejected the offer and asked the Director-General to intervene on his behalf "in view of [his] professional and personal position". The Assistant Director-General for Management and Administration replied on 11 October 1995 that the Director-General was unable to comply with his request but that, since the complainant had been put on sick leave, his post would be "extended accordingly". As a result of further authorised periods of sick leave, the decision to separate him was postponed first until 30 November 1995, then to 31 January 1996 and again, to 15 July 1996, in other words after the normal expiry date of his fixed-term appointment – 31 May 1996. The complainant having objected to 15 July, the Administration gave him a further extension until 31 July "to preserve his rights" while arranging for the Senior Personnel Advisory Board to examine his case on 22 July. The complainant sent UNESCO two letters: one on 11 July informing it that he construed the further extension as moving the deadline for separation by mutual agreement to 31 July; and another on 16 July saying that although

he found his "dismissal" not only unjust, but vexatious, he had decided to accept the offer of a negotiated separation as from 31 July. The Administration asked him to report on 19 July to formalise his acceptance. He was handed a memorandum setting out the benefits he was to get on condition that he undertook not to appeal, in particular to the Tribunal. He signed it having written on it by hand "Read and approved – my acceptance is firm, final and irrevocable".

2. The complainant is asking the Tribunal to declare void the memorandum of 19 July 1996 containing his acceptance of separation from service by mutual agreement. In his complaint, he contends that his termination of appointment cannot be viewed "as the result of a freely concluded agreement, but rather as a unilateral action disguised as an 'mutual agreement'". In his rejoinder, he argues that his complaint is in fact an application to have the settlement he allegedly accepted on 19 July 1996 declared void. In any event he contests the validity of his consent since the sole reasons for it were his precarious financial situation engineered by UNESCO and his medically certified depression.

3. The Organization replies that the complaint is irreceivable on several counts: the complainant failed to exhaust his internal remedies; it is time barred because he did not take it to the Tribunal until 1 August 2000; the Tribunal is not competent to entertain an application to have an agreement declared void; and by agreeing to the settlement the complainant waived his right to appeal. The complainant considers that his application to have the agreement voided did not lie with the Appeals Board and was not subject to any time limits.

4. The Tribunal will not take up this issue, except to note that the complainant appealed on 6 October 1995 against the Director-General's implied rejection of his challenge to the abolition of his post and the decision to terminate him. The memorandum of 19 July 1996 put an end to that dispute. The only remaining issue, therefore, is whether the complainant's acceptance of the agreement shows lack of consent. The Tribunal is competent to rule on the circumstances in which an international

civil servant's appointment is terminated, and it will do so without going into the Organization's objections to receivability.

5. The complainant cites financial difficulties and a "reactive anxio-depressive clinical context" to demonstrate that he was in no state to consent freely. But the evidence shows that he had been examined by an expert chosen by mutual agreement between his doctor and the Chief Medical Officer of UNESCO and that he had been found fit to resume work as from June 1996. There are no grounds for doubting that the complainant had all his mental faculties when, after lengthy negotiations, he finally accepted an offer which afforded him significant financial benefits. He has neither proved that his consent to the negotiated termination was deficient nor provided any evidence to cast doubt on its validity. That being so, the Tribunal need not rule on whether his termination was unlawful or entertain his claims to compensation, which must consequently be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 27 April 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

(Signed)

MICHEL GENTOT MELLA CARROLL JAMES K. HUGESSEN

CATHERINE COMTET

NINETY-FIRST SESSION

***In re* Samorodov**

Judgment No. 2050

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Alexander Samorodov against the International Labour Organization (ILO) on 22 September 2000, the ILO's reply of 23 November, the complainant's rejoinder of 14 December 2000, and the Organization's surrejoinder of 15 February 2001;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Russian national born in 1947, joined the ILO in 1986. He holds an appointment without limit of time at grade P.4.

In order to implement four strategic objectives, restructuring took place within the International Labour Office in 1999 which resulted in the creation of four corresponding technical sectors. Most of the existing positions in the Office that were of a technical or operational nature had to be adapted to fit into a relevant sector. The new structure was announced to staff by the

Director-General on 23 September 1999 in circular 561, of series 1. Staff were informed in that circular that each of the Executive Directors had been asked to complete the composition of their sector teams. One of the new sectors was the Employment Sector, into which the Employment and Training Department, where the complainant had been working prior to the restructuring, was absorbed.

On 3 December 1999 the Executive Director of the Employment Sector sent out a minute to all staff in his Sector summarising the progress made in staffing the Sector. Two weeks previously the complainant had been informed at a meeting with a representative of the Personnel Administration Branch and a team leader from the Employment Sector that no position suitable to his skills and experience had, so far, been found for him. After extensive inquiries, made over several months, a post was found for him in one of the units of the Employment Sector and he was to be transferred to it as from 1 June 2000.

The complainant lodged an internal complaint on 7 April 2000 under Article 13.2 of the Staff Regulations seeking the quashing of "the decision to exclude [him] from the Employment Sector", and the assignment of "functions consistent with [his] competence and experience". He also sought moral damages and costs. By the time a decision was taken on the complaint by the Director-General the complainant had already been transferred to his new post; the only outstanding issues were moral damages and costs. In a letter of 10 July 2000 the complainant was informed by the Director of the Human Resources Development Department that the Director-General had rejected the internal complaint. That is the impugned decision.

B. The complainant contends that, as a result of the restructuring exercise, he was deprived of his functions from 1 January 2000 without due warning. He had been passed over in spite of the fact that he had a contract without limit of time, proven linguistic skills and good previous performance appraisals. The Organization showed bias against him on account of his age and gender. Such discrimination also represented abuse of power during the restructuring exercise. He was made "a scapegoat" by the ILO for its personnel policy mistakes which had resulted in a gender imbalance. He submits that the flaws in the restructuring process resulted in "grave professional and personal damage".

The Administration also stopped responding to the letters he sent to the Human Resources Development Department, thus "sealing an atmosphere of vacuum around [him]". He states that he was "humiliatingly discredited in the eyes of [his] former colleagues" because he had to wait five months before being reassigned.

He claims an indemnity in respect of the "moral and professional prejudice" suffered and costs.

C. In its reply the Organization does not object to the receivability of the complaint as a whole; however, it objects to receivability insofar as the complaint could be construed as claiming damages for alleged "restructuring flaws". Moreover, the complainant does not cite any specific instance in which he was deprived of an assignment as a result of the discrimination he alleges.

The Organization submits that all relevant staff regulations and rules were observed in the restructuring process. The complainant was given the same information and the same opportunity as other officials to have his preferences and potential taken into account during the restructuring. The task of finding meaningful work for the complainant in the new structure was made more difficult because he would not accept any solution that was not up to his expectations or that was "fill-gap" in nature. In fact he rejected a request to undertake a technical mission on behalf of the ILO because he was not a member of any unit.

The ILO denies humiliating him. He has misinterpreted the minute of 3 December 1999, which was only meant to show the progress made in staffing the Employment Sector.

It regrets that the complainant experienced distress during the months preceding his reassignment but considers that this did not arise from any act or omission amounting to non-observance of the complainant's terms of appointment.

D. In his rejoinder the complainant contends that a female staff member with less experience than he had was brought from the field to headquarters and assigned the same work as him, which eventually led to his *de facto* suspension from duty with salary. He submits that he had valid legal reasons for not undertaking the mission the Organization refers to and claims that this is another example of bias against him.

E. In its surrejoinder the Organization submits that the complainant's plea regarding the female staff member, and any claims arising from it, is irreceivable for failing to exhaust all internal means of redress, this being specified for the first time in his rejoinder.

It reiterates that there was no decision to deprive the complainant of, or suspend him from his functions, and it regrets that it took several months to find him a suitable post after the restructuring. It points out that there was only a minor administrative problem with the proposed mission which could have been resolved by the Administration if the complainant had wished to undertake it. The Organization recognizes that the restructuring caused the complainant stress, but states that it has not breached any obligation towards him.

CONSIDERATIONS

1. In 1999 the International Labour Office carried out a restructuring exercise. Four strategic objectives had been identified and in the restructuring it put in place four corresponding technical sectors. One of these was the Employment Sector. The Executive Director of that sector convened a meeting on 3 May 1999 for all Professional staff whose units were likely to become elements of the new sector. This was followed by several meetings and officials were encouraged to specify which new unit or units interested them and to be active in seeking contact with them.

2. The new structure was formally announced to the staff in a circular of 23 September 1999. The first appointments at management level were also announced therein. The staff were advised that each of the Executive Directors had been asked to complete the composition of their sector teams. The new units within each sector were listed in an attachment to the circular.

3. On 3 December 1999 the Executive Director of the Employment Sector issued a minute addressed to all staff in that Sector. The minute set out the current staffing of the Sector. The complainant's name was not included. The complainant claimed that, as a result of this document, he was deprived of work as of 1 January 2000 and suffered "moral and professional prejudice".

4. On 7 April 2000 he lodged an internal complaint under Article 13.2 of the Staff Regulations, asking that "the decision to exclude [him] from the Employment Sector" be quashed and that "functions consistent with [his] competence and experience" be assigned to him. He claimed an indemnity to compensate him for "moral and professional prejudice", and costs.

5. There were ongoing attempts and negotiations to find the complainant a suitable position. Eventually, by mutual agreement, he was assigned to a position within one of the units of the Employment Sector, effective as of 1 June 2000.

6. The Director of the Human Resources Development Department notified the Director-General's final decision to the complainant on 10 July 2000. He recalled the different stages of the restructuring process and the consultation that had taken place with the staff. He said that the minute of 3 December 1999 had not excluded anyone. It had listed the names of individuals whose situation was clear at the time; other announcements were to be made later. The complainant was not the only staff member whose name did not appear. He told the complainant that there was no basis to

award him compensation for "moral and professional prejudice" or for costs. This is the decision impugned.

7. In this complaint the complainant confines his claim for relief to an indemnity for "moral and professional prejudice" and costs. He claims that he was deprived of work without warning; that he was deprived of his functions solely on the basis of gender and age; that simultaneously the Organization ceased replying to his letters; that, in March 2000, it told him "there was no work"; and that he was thus "humiliatingly discredited" in the eyes of former colleagues. He says that, although he was given work from 1 June 2000, he received no compensation for undue suffering, "public humiliation" and discrimination.

8. For the complaint to be considered receivable under Article VII, paragraph 1, of the Tribunal's Statute the complainant must first have exhausted all means of internal appeal that were open to him. It is plain on the evidence that no issue was raised by the complainant in his Article 13.2 complaint about the restructuring process itself or the appointment of any particular person who was preferred over him on the basis of age or gender. On that basis he cannot now raise issues that were not first set out in his internal complaint.

9. The gist of the case is whether the issuing of the minute of 3 December 1999 deprived the complainant of work and caused him "moral and professional prejudice".

10. As to whether the complainant was deprived of his functions or excluded from the Employment Sector, the Organization points out that he does not allege any specific instance in which he was deprived of an appropriate assignment. It denies that there had been no prior notice or information concerning how the appointments would be made. There had been meetings and officials were asked to make their interest in particular units known. Positions were not open to competition but were filled by transfers in the same grade and by direct selection as the relevant rules

allowed. The complainant was provided with all necessary information as to assignments available, and he had the same opportunity as other officials to have his own preferences taken into account. The Organization states that the complainant's skills and specialisation (in transition economies) were not considered as relevant to the needs of the new structure as those of other officials. Two weeks before the minute of 3 December 1999 was issued, the team leader concerned and a representative of the Personnel Administration Branch told the complainant that no position had yet been found for him.

11. The Organization comments that the complainant seems to have adopted a "somewhat passive attitude" to the whole restructuring process. At the same time, it agrees it had to do all that was practicable to see that he was given work and responsibility appropriate to his grade. It says that the task of finding work which the complainant would recognise as meaningful was not easy. He rejected a request to undertake a technical mission in early 2000 on the basis that since he was not in any unit he could not be sent on mission. He turned down a proposed appointment in Moscow because the post was not at grade P.5 and would not have secured him a promotion. He did however, participate in a management course which he stated he found a useful exercise.

12. Contrary to what the complainant claims, the minute of 3 December 1999 does not set out a list of all staff in the employment sector. The Organization asserts that he has misinterpreted the document. The omission of the complainant's name merely meant that he was not one of the staff appointments at the time the minute was circulated.

13. Paragraph 1 of the minute reads:

> "The building of teams in our Sector is progressing well and we are now in a position to make further appointments. I am therefore happy to summarize below the current staffing of the Sector. This composition reflects appointments already made as well as new ones. It comprises most, but not yet all, posts which are funded by the Regular Budget and [programme support income]. It does not yet include external recruitments nor transfers from field offices to headquarters."

14. The Tribunal finds that the minute of 3 December 1999 is what it says it is: a summary of the current staffing of the Employment Sector. The complainant was not the only headquarters official in that sector whose name was not included in the list set out therein. The complainant was unreasonable in construing the minute as a decision not to employ him. He had been told two weeks previously that a place had not yet been found for him. Eventually an assignment was identified with which he agreed. The delay was not due to any breach on the part of the Organization of its obligations towards the complainant as a staff member. Neither was there any breach of its duty to do all that was practicable to see he was given work and responsibility appropriate to his grade.

15. The Tribunal does not find any basis for awarding compensation for any perceived humiliation or slight by reason of the fact that the complainant's name was not on the list contained in the minute of 3 December 1999.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 3 May 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF
GENÈVE

CATHERINE COMTET

NINETY-FIRST SESSION

***In re* Gupta (No. 8)** **Judgment No. 2051**

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Mr Shiv Raj Gupta against the World Health Organization (WHO) on 15 May 2000, the WHO's reply of 22 August, the complainant's rejoinder of 19 September and the Organization's surrejoinder of 20 December 2000;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Some information on the complainant's career in the WHO's Regional Office for South-East Asia (SEARO) in New Delhi is given under A in Judgment 1473 on his first complaint. At the material time he held grade ND.4, had worked at SEARO for nineteen years and held a career service appointment.

On 10 August 1998 SEARO issued a vacancy notice for a post (No. 5.2534) of clerk III, at grade ND.5, in the Office of the WHO Representative to India, in New Delhi. The complainant applied for the post. The last date for receipt of applications was 7 September. The post was to become vacant on 1 December 1998.

By information circular IC-98-23 of 14 October 1998 the WHO announced changes in the selection and recruitment procedures for General Service staff at SEARO and the WHO Representative's Office. The new procedures were to apply to posts falling vacant on or after 1 November 1998 and replaced those put in place in June 1994.

The complainant was on annual leave from 15 October to 8 November 1998. On 26 October the Special Assistant in the Representative's Office asked him by telephone to attend an interview within the next two days. The complainant replied that he was preparing for his daughter's wedding, which would take place on 31 October, and he would only be available after his return from annual leave. He was not interviewed, and by a letter of 6 November 1998 the Regional Personnel Officer informed him that he had not been selected for the post. By a memorandum of 14 December the complainant asked the Regional Personnel Officer whether the selection procedure had been conducted under the new procedure outlined in the circular of 14 October, or the "old" procedure which it replaced. He replied on 15 December 1998 that since the "processing of the selection" was initiated long before 1 November the "old" selection procedure applied.

The complainant appealed to the Regional Board of Appeal against the decision not to appoint him. In its report of 28 April 1998 the Board recommended that the selection for the post be set aside. The Regional Director did not uphold that recommendation and rejected the appeal. The complainant appealed to the Headquarters Board of Appeal, which, in its report of 22 November 1999, found that SEARO had failed to apply the correct selection procedures and had incorrectly excluded the complainant's application from consideration. It recommended quashing the selection procedure for post 5.2534, initiating a new one and awarding him costs. In a letter of 10 April 2000, the impugned decision, the Director-General informed the complainant that she was not entirely convinced by the Headquarters Board's reasoning and the selection process would not be quashed; however, as both Boards raised the possibility of a technical flaw, he would be awarded compensation of 2,000 United States dollars. The complainant was paid that sum on 19 April 2000.

B. The complainant submits that he was not given a "fair chance" in the selection process. He alleges personal prejudice against him on the part of responsible officials, incomplete consideration of the facts, abuse of authority and breach of due process.

He says the WHO "manoeuvred" the successful candidate, Mr K., into the post in order to facilitate his selection. That official was assigned to the Representative's Office at grade ND.4 in mid-1998 and his assignment was simply extended until he was promoted to ND.5 on the post in question on 1 December 1998.

The complainant contends that SEARO failed to give him proper notice when it asked him to come for an interview. He was genuinely unable to attend and, as a result, his candidature was effectively "cancelled" and his suitability for the post was ignored.

He claims that the selection process should have been conducted under the new procedure which applied to all General Service posts falling vacant on or after 1 November1998. It therefore applied to post 5.2534 which was only to become vacant on 1 December upon the retirement of the incumbent. The selection process was "rushed through" so as to avoid it being made under the revised provisions. He would have benefited under the new procedure because of his seniority and excellent appraisal reports.

Furthermore, he argues that the Director-General's decision is "invalid". Both appeal boards recommended quashing the selection but in the impugned decision the Director-General gave no reasons for disagreeing with their findings.

He wants the selection to post 5.2534 to be set aside and a new selection process undertaken in accordance with the procedure defined in the circular of 14 October 1998. He asks for an award of damages in an amount of 10,000 dollars for material and moral injury and claims costs.

C. The Organization replies that the selection process was carried out in conformity with the applicable rules. The post was advertised in August 1998 and at that time the 1994 selection procedures applied. Having begun the process under the 1994 procedure it completed it under the same one. It would not have been sound personnel practice to apply two different procedures to the same selection. There is, moreover, no evidence that the complainant would have fared better under the 1998 selection procedures. Seniority is a factor under both the old and new procedures but it does not determine selection.

It stresses that the staff member appointed to the post was chosen following an impartial process. He had been temporarily reassigned to the Representative's Office for a period of three months, to provide assistance in a busy office, but during that time he was not performing the duties pertaining to the post in question.

The Organization states that all eligible candidates were contacted on the same date and asked to come for an interview on 27 or 28 October. The acting WHO Representative in India, who was responsible for conducting the interviews, was to be absent from 2 November. The Organization's wish to conclude them before that date was therefore reasonable, particularly as the post was to fall vacant on 1 December. It says that it took reasonable steps to facilitate interviewing the complainant. It even offered to send a car and driver to fetch him. In declining the opportunity to be interviewed the complainant rendered his selection impossible since an interview was a prerequisite for selection.

Because both appeal bodies raised the issue of whether there was a technical flaw in the selection process the Director-General awarded the complainant 2,000 dollars. The complainant has thereby been amply compensated.

At the request of the Tribunal the Organization gave Mr K., the selected candidate, the opportunity to comment on the complaint. It produces a memorandum of 5 June 2000 in which he says that he does not wish to express any view.

D. In his rejoinder the complainant contends that the selection process does not begin with the issuance of the vacancy notice. It was unusual practice to issue the vacancy notice months before the vacancy was to arise. The post in question was to become free only on 1 December 1998 and therefore the Organization cannot justify using the 1994 selection procedures. Moreover, he did not decline to be interviewed – he merely sought "due notice" and a "fair opportunity".

The complainant takes up an issue raised by the Regional Board of Appeal in its report and contends that there was a flaw in the composition of the Ad Hoc Selection Committee which assessed the candidates for the post. The Board found that, according to the selection procedures instituted in 1994, the Ad Hoc Selection Committee had to include an official from the Unit with the vacancy but who was not a Director. However, it noted that the acting WHO Representative in India, who was also responsible for conducting the interviews, was at Director level. The complainant contends that the latter was not competent to interview candidates. The Board also found the composition of the Committee to be flawed under the 1998 procedures.

E. In its surrejoinder the Organization affirms that the recruitment and selection process began with the publication of the vacancy notice. It notes that the complainant puts forward no other argument as to when it began. The process of reviewing applications started on 7 September 1998 and was steadily carried forward.

The complainant is wrong in his assertion that the acting WHO Representative should not have participated on the Selection Committee. He was a short-term professional at grade P.6 but was not a Director. He was not prevented by the rules from interviewing candidates.

CONSIDERATIONS

1. The complainant joined SEARO on 12 July 1979 and in January 1994 he was given a career service appointment. At the material time he held grade ND.4.

2. On 10 August 1998 a vacancy notice for the post of clerk III at grade ND.5 was issued and on 7 September 1998, the closing date for applications, the complainant applied. He was notified on 6 November 1998 that he had not been selected. He lodged an appeal against this decision with the Regional Board of Appeal which recommended setting aside the selection. The Regional Director did not accept this recommendation and dismissed the appeal. The complainant appealed to the Headquarters Board

of Appeal. The Board recommended that the selection be quashed, that a new selection procedure be initiated and that legal costs be paid.

3. By a letter of 10 April 2000, the impugned decision, the Director-General refused to quash the selection process, but because both Boards of Appeal raised the question of a technical flaw in the selection process she awarded the complainant 2,000 United States dollars in compensation.

4. The complainant has three pleas. He claims that:

(a) The Organization should have applied the selection procedure outlined in information circular IC-98-23.

(b) The Organization did not give him adequate notice to attend an interview for the post and, as a result, he was no longer considered to be a candidate.

(c) The selection was the result of personal prejudice.

5. New selection and recruitment procedures for General Service posts were issued on 14 October 1998 and were to be applied for a trial period of one year. The procedures were to apply to posts falling vacant on or after 1 November 1998 in SEARO and the Office of the WHO Representative in India. In the present case, post No. 5.2534 was to fall vacant when its incumbent retired on 30 November 1998. The successful candidate would assume his functions on or after 1 December 1998.

6. The Organization did not apply the new selection procedure and instead used the selection procedure that had applied since June 1994. It seeks to justify this by relying on the fact that the vacancy notice was issued on 10 August 1998 and the closing date for applications was 7 September. It claims that the selection process commenced on 10 August 1998 when the vacancy notice was issued and therefore the 1994 procedure continued to apply. It maintains that the Administration acted correctly in applying it. For selections where the vacancy notice was issued on or after 1 November 1998 the Organization applied the 1998 procedures. It further claims that no matter which procedure was applied the outcome would have been identical.

The complainant could not have been selected as he declined to be interviewed and an interview was an essential prerequisite for selection.

7. In the view of the Tribunal the Organization failed to apply a clear rule, laid down in information circular IC-98-23, that the new procedures applied to vacancies occurring on or after 1 November 1998. All that had occurred up to 14 October 1998 was that a vacancy notice had been issued and applications were received. The Organization was not entitled to refuse to apply the new procedure merely because the vacancy notice was issued before 14 October 1998.

8. Since the Organization failed to apply its own rules the complainant is entitled to succeed on this point.

9. The complainant's second plea concerns lack of notice on being called for interview. He took approved annual leave from 15 October to 8 November 1998 to prepare for his daughter's marriage on 31 October 1998. On 26 October the Special Assistant in the Representative's Office contacted him by telephone to arrange an interview on 27 or 28 October. The complainant said he was unable to attend as he was busy making arrangements for the wedding. He offered to come for interview on 10 November after he returned from leave. This did not suit the Administration as the acting Representative would be away from 2 November. On both 27 and 28 October another official contacted him urging him to come for an interview, but the complainant's response was the same. Because he did not attend the interview his name was removed from the list of candidates considered by the Ad Hoc Selection Committee when it met on 2 November 1998.

10. No explanation is given as to why only one day's notice was provided before the interviews were held, nor why it was necessary to rush them through, nor why the selection had to be made in early November when the vacancy did not arise until 1 December. It is reasonable that the complainant could not attend an interview in the middle of the pre-wedding preparations. There is also no explanation of why the complainant could not

have been interviewed when the acting Representative, who was the responsible officer, returned from his absence.

11. The failure to give reasonable notice to the complainant to attend an interview by refusing to take into account the family circumstances of the complainant at the time, followed by the elimination of the complainant from consideration when he could not attend, constitutes another flaw in the procedure adopted by the Administration in respect of the selection for this post. The complainant succeeds also on this point.

12. The complainant claims there was personal prejudice against him because the candidate selected for the post was placed in the Representative's Office in mid-1998 by the Special Assistant in anticipation of the vacancy that was to arise on 1 December 1998. The complainant claims this was to facilitate the eventual selection and promotion of this person to the post. He also claims that the selection process was rushed through by the Regional Personnel Officer and the Special Assistant in the mistaken belief that the more objective revised procedure would not apply, whereas there was no necessity for such haste.

13. The person appointed to the post, Mr K., said that he did not wish to express any view as far as the complaint was concerned.

14. The Organization claims that, prior to his selection, the successful candidate had been temporarily reassigned to the Representative's Office to provide additional assistance in a busy office. The duties he performed had previously been performed by a retired staff member who was under contract until May 1998. They were not the duties pertaining to post 5.2534. Moreover, the Special Assistant did not participate in the selection process and did not interview candidates. His role was limited to providing administrative support such as contacting candidates to arrange interviews.

15. Whatever suspicions the complainant may have, the Tribunal is unable to hold that he has proved personal prejudice. The duties which the successful candidate was asked to perform in the Representative's Office were not those pertaining to post 5.2534. Also, the lack of notice for the

interview does not appear to have been directed solely at the complainant. This plea fails.

16. Since the complainant succeeds on the first two scores, he is entitled to have the selection for post 5.2534 set aside and a new selection made in accordance with the selection procedure currently applicable, albeit on the understanding that the Organization must shield the successful candidate from any injury that may result from the quashing of an appointment accepted in good faith.

17. The complainant claims damages amounting to 10,000 United States dollars for material and moral injury for depriving him of a fair chance of selection to the post. He has already been awarded and has received 2,000 dollars. Since the complainant will be entitled to apply for the post under the new selection process, the Tribunal considers a further award of damages as unnecessary. He is, however, entitled to an award for costs.

DECISION

For the above reasons,

1. The selection made for post 5.2534 is set aside.
2. The Organization should proceed with a new selection in accordance with the procedure currently applicable.
3. The complainant is entitled to 500 United States dollars in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 27 April 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

Flerida Ruth P. Romero

FLERIDA RUTH P. ROMERO

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL
GENEVA

NINETY-FIRST SESSION

Judgment No. 2052

***In re* Henrotte**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs Isabelle Henrotte against the European Patent Organisation (EPO) on 7 August 2000 and corrected on 8 September, the EPO's reply of 27 November 2000, the complainant's rejoinder of 26 February 2001 and the Organisation's surrejoinder of 12 April 2001;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a French citizen who was born in 1963, joined the staff of the European Patent Office, the EPO's secretariat, in 1986 as an examiner at grade A1 at The Hague; on 1 April 1990 she was transferred to Munich where she reached grade A3.

Article 23 of the Service Regulations for Permanent Employees of the European Patent Office provides that: "A permanent employee shall reside either in the place where he is employed or at no greater distance therefrom than is compatible with the proper performance of his duties". Article 62, on sick leave, stipulates in its third paragraph that prior permission of the President of the Office is required if the permanent employee wishes to spend sick leave elsewhere than at "his place of residence" referred to in Article 23.

The complainant has been ill since 1992. In view of the amount of sick leave she had taken the EPO notified her on 13 July 1995 that it would have to initiate proceedings before the Invalidity Committee. This Committee issued several reports over several years.

In its first report, issued in October 1995, the Committee concluded that the complainant was not suffering from permanent unfitness for work and should progressively resume her duties. In its second report, issued in January 1996, it decided that the complainant should undertake treatment in France. In its sixth report of July 1997 it decided that, although she still needed treatment, she should progressively resume work. She did so for a short period only. In letters sent to her in mid-1998 the Administration reminded her of her obligations under Article 62(3), to obtain prior permission if she wished to spend her sick leave in France.

In its eighth report, issued in early February 1999, the Committee unanimously decided to extend the complainant's sick leave to 31 December 2001. In an addendum, dated 24 February 1999, it concluded by a majority that she should continue her treatment, and that it could in principle be provided in Munich if it were dispensed by a French-speaking therapist.

By a letter of 3 February 1999 the complainant sought authorisation to spend her sick leave in France; on 18 February permission for this was granted. She was expected to return to Munich on 16 May 1999 but she did not attend a medical consultation arranged there for 20 May. On 17 June the EPO told her that she was in breach of her obligations under Article 62(3), since she was spending time in France without authorisation.

In its ninth report, of April 2000, the Committee maintained the decision to extend her sick leave until 31 December 2001 and decided that the specialist treatment that she had been undertaking should be continued with a view to restoring her fitness to work. By a majority it again decided that the treatment could in principle be provided in her place of work, which was Munich.

The Director of Personnel Management wrote to the complainant on 8 May 2000, sending her a copy of that report. He confirmed that her sick leave was extended on condition that the specialist treatment was continued. He said that approval to spend her sick leave in France could not be granted since the required treatment had to be carried out in Munich, and any failure to fully comply with it could result in her emoluments being stopped and in disciplinary measures being initiated against her. The complainant impugns that decision.

In March 2001, in its tenth report, the Invalidity Committee found that the complainant was suffering from "total invalidity". She was awarded an invalidity pension as of 1 March 2001.

B. The complainant submits that the decision of 8 May 2000 was issued subsequent to an opinion given by the Invalidity Committee and therefore she did not need to file an internal appeal.

She wants to be allowed to spend her sick leave in France. She argues that the Invalidity Committee merely stated that the required treatment could "in principle" be carried out in Munich; it did not say that it "must" be done in Munich. Moreover, it was not within its power to decide in which country or city a particular treatment had to be carried out. Such an issue is not a medical question. It comes under employment law and therefore it is up to the Administration to take a decision on the matter. While a decision on where sick leave may be taken is at the discretion of the President or his representative, it should not be taken arbitrarily. The text of the letter of 8 May 2000 did not state the true grounds for the decision, nor did it show that any weighing of interests had taken place.

A correct weighing up of interests would come down in her favour. She wished to stay in France as she was sick and bringing up a small child on her own and wanted to benefit from the proximity of her family. She had built up a relationship of trust with her therapist. Treatment in Munich would have raised language problems. Since her sick leave had been extended to 31 December 2001 she would clearly not have been available to work before then. Given the length of her sick leave the Organisation had no legitimate interest in her remaining at her place of employment. Moreover, she continued to have "her residence in Munich"; therefore, she had not violated the residence obligation contained in Article 23 of the Service Regulations.

Because her problems have not diminished she is seeking, outside the framework of the invalidity proceedings, to determine the cause of her illness. Her state of health has been further damaged by the Organisation's threats of salary freezes and disciplinary measures.

The complainant seeks the quashing of the impugned decision in so far as it obliges her to undergo medical treatment in Munich and refuses to allow her to spend her sick leave in France. She claims an award of damages of at least 2,000 German marks and costs.

C. In its reply the Organisation concurs with the complainant on the issue of receivability. The EPO's decision of 8 May 2000 was based on the Invalidity Committee's ninth report; it relates to a medical matter and can only be challenged before the Tribunal. However, the Organisation notes that the complainant also contends that the decision of 8 May 2000 was "not a medical decision". In making that assertion she forgets that if that were the case, her complaint would be irreceivable by virtue of the fact that she did not file an internal appeal against the challenged decision.

Moreover, the EPO contends that the complainant's arguments are devoid of merit. Under Article 23 of the Service Regulations a permanent employee has an obligation to reside "in the place where he is employed". That obligation applies to staff on sick leave too, and under Article 62 staff must obtain the prior permission of the President of the Office if they wish to spend their sick leave elsewhere. Those provisions have their foundation in the defendant's duty of care towards its staff and the Invalidity Committee had to be in a position to monitor properly the complainant's treatment and progress. Furthermore, Article 23 requires the staff member to be actually living in the place of employment, and not just simply able "to indicate an address" there for the purposes of receiving mail. She did not even have the latter, because a registered letter despatched to the complainant on 10 August 2000 was returned undelivered to the EPO since the complainant had not collected it.

A majority of the Invalidity Committee found that the treatment she needed could in principle be provided in Munich and by applying that opinion the EPO took a reasoned decision. If her current treatment is the appropriate one then the opinion that it could be dispensed in Munich is correct. If, as suggested by the complainant, her current treatment is not the right one for her then there was no reason to pursue it in France.

The Organisation considers that there is no basis for the complainant's claim to damages. It repeatedly agreed to the complainant's requests to stay in France with her family, and did not cut her salary even though she was often in breach of her statutory obligations.

D. In her rejoinder the complainant maintains that her complaint is receivable. She says that under Article 107 of the Service Regulations the lodging of an appeal "shall not apply to decisions taken after consultation of the Invalidity Committee"; she considers therefore that it would not have been appropriate to file an internal appeal.

Given the circumstances of her case the complainant sees no relevance in applying Article 23 to her. Under that article, permanent employees should live at a distance "compatible with the proper performance of [their] duties". Since she is on sick leave until 31 December 2001 she will not be performing her duties anyway. Although the Organisation, through the Invalidity Committee, has a "right of verification", this right is limited to verifying whether her medical treatment is appropriate and what progress has been made. Even if she was not residing in Munich, her therapist could still inform the Committee regularly of her progress.

She takes issue with the fact that the EPO continued to address mail to her personally although it was aware that she had a legal representative. As a result of her not collecting the letter dated 10 August 2000 the Organisation assumed she had "gone away from her place of work without permission" and then informed her it was proceeding with disciplinary measures against her.

The complainant contends that the impugned decision is unlawful, among other reasons, on the grounds of its medical foundation. In her view the Invalidity Committee's ninth report, on which the impugned decision was based, was not an "objective report by a joint body of medical practitioners"; in recommending therapy the Committee substantially reproduced the view of the EPO's medical officer.

E. In its surrejoinder the Organisation points out that the Invalidity Committee has decided that the complainant is now permanently unable to perform her duties and she has been awarded an invalidity pension as from 1 March 2001. That being the case, it sees no need to rebut all of the complainant's allegations relating to the proceedings before the Committee. Nevertheless it maintains its earlier arguments. It rebuts the complainant's allegations of lack of medical foundation and objectivity of the Invalidity Committee's opinion and states that her comments are not substantiated.

CONSIDERATIONS

1. The complainant, who is now on an invalidity pension but was formerly on sick leave, impugns the decision of the European Patent Office not to grant her permission to spend her sick leave elsewhere than at her place of residence in Munich.

2. According to Article 23 of the Office's Service Regulations:

> "A permanent employee shall reside either in the place where he is employed or at no greater distance therefrom than is compatible with the proper performance of his duties."

Article 62 of the Service Regulations deals with sick leave. In its third paragraph it reads:

> "If he wishes to spend sick leave elsewhere than at his place of residence referred to in Article 23, he shall obtain prior permission of the President of the Office."

In the Tribunal's view, it is clear that what is intended here by the concept of "residence" is actual physical presence on a regular basis. A mere address where mail can be forwarded is not sufficient.

3. Pursuant to Rule 6(iv) of circular 22 (the guidelines for Article 62):

> "... The President may, after consulting a doctor appointed by the Office, authorise the person concerned to remove himself from his place of residence, as defined in Article 23 in order to spend his sick leave elsewhere."

As appears from the facts of the case, neither the President of the Office, nor the Administration on his behalf, consulted "a doctor appointed by the Office", but instead consulted the Invalidity Committee already dealing with the complainant's case and which was composed of three doctors, one of whom was chosen by her.

4. Articles 106 and 107 of the Service Regulations provide for appeal procedures. Article 106(1) reads:

> "Any decision relating to a specific individual to whom these Service Regulations apply shall at once be communicated in writing to the person concerned. Any decision adversely affecting a person shall state the grounds on which it was based."

As for Article 107, the first and second paragraphs read:

> "(1) Any person to whom Article 106 applies may lodge an internal appeal either against an act adversely affecting him, or against an implied decision of rejection as defined in Article 106.
>
> (2) The provisions of paragraph 1 shall not apply to decisions taken after consultation of the invalidity Committee."

5. The appeal of a decision granting or refusing permission to spend sick leave elsewhere than at the staff member's residence would normally be required to go through the internal appeals process before it could be brought to the Tribunal. The exception found in Article 107(2) appears to be designed to exclude any internal appeal against proceedings which must necessarily, under the Service Regulations, be decided by the Invalidity Committee and not, as the complainant contends, to create a "shortcut" to the Tribunal in every case where that Committee may have been consulted even if such consultation is not required. Whether the fact that the Administration may arguably have erred, by consulting the Invalidity

Committee instead of a doctor appointed by the Office, could be sufficient to give the Tribunal jurisdiction by applying the exception found in Article 107(2) of the Service Regulations may, therefore, be seriously doubted. However, in view of the conclusion it has reached on the merits, the Tribunal does not find it necessary to express a final opinion on this question.

6. The decision not to give permission to spend sick leave elsewhere than at the staff member's place of residence is clearly discretionary in nature. It is well-established by the case law of the Tribunal that a discretionary decision is subject to limited review. As was said in Judgment 1969 (*in re* Wacker) under 7: "the Tribunal will quash such a decision only if it was taken without authority, or if it was tainted with a procedural or formal flaw or based on a mistake of fact or of law, or if essential facts were overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence" (see also Judgment 525 (*in re* Hakin) under 4).

7. Although the impugned decision may have been preceded by a procedural error in that the Administration consulted, not "a doctor appointed by the Office", but the Invalidity Committee, that error is of no avail in the circumstances. One of the doctors sitting on the Invalidity Committee is in fact a doctor appointed by the Office. There is no indication that the complainant was in any way prejudiced by the error.

8. The complainant's main criticism lies with the sufficiency of the reasons provided to her by the decision-maker. According to her, the decision of 8 May 2000 did not state the "grounds" upon which it was based, pursuant to Article 106(1) of the Service Regulations. The complainant is wrong. The relevant portion of the decision reads:

> "The majority on the Invalidity Committee found that the necessary treatment can, in principle, also be carried out in Munich ... I would point out, however, that approval for you to be allowed to spend your sick leave in France cannot be granted, since the necessary treatment has to be carried out at your place of employment, Munich."

It is clear from this that the Administration refused to grant permission because it believed, on the advice of the Invalidity Committee, that the treatment could be carried out in Munich. There is no need for the decision to contain more elaborate reasons. There is nothing to suggest that the interests of the complainant were not weighed with those of the EPO. The Invalidity Committee had issued nine distinct medical reports over the years and was obviously knowledgeable about the complainant's health and personal circumstances. While it is true that there are humanitarian circumstances that play in favour of the complainant's position (her child, the fact that her friends, family and usual therapist are all in France), it is also true that the Organisation had a genuine interest in having the complainant close by to monitor properly both whether she followed her treatment and that progress was being made, as well as to be able to assess whether the treatment received was appropriate. The weighing of those respective considerations is properly a matter for the Organisation and the complainant has not demonstrated that there is any basis upon which the Tribunal could interfere.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 3 May 2001, Miss Mella Carroll, Vice-President of the Tribunal, Mr James K. Hugessen, Judge and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

Mella Carroll

MELLA CARROLL

James

JAMES K. HUGESSEN

Flerida Ruth P. Romero

FLERIDA RUTH P. ROMERO

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

NINETY-FIRST SESSION

***In re* Cappadonia (No. 2)** **Judgment No. 2053**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs Marcella Cappadonia against the European Patent Organisation (EPO) on 11 March 2000 and corrected on 14 April, the EPO's reply of 5 July 2000, and the Registrar's letter of 15 February 2001 informing the complainant that, the time limit for filing a rejoinder having expired, the written pleadings had closed under Article 9(2) of the Rules of the Tribunal;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Italian national born in 1960, is a permanent employee with the European Patent Office, the EPO's secretariat. She took up her employment with the EPO on 1 September 1990. Shortly thereafter the Personnel Department informed her that her reckonable experience "for purposes of recruitment and promotion" had been calculated as 3 years and 7 months, which corresponded to grade A2-2-7. She was promoted to grade A3 as of 1 October 1999.

On 12 December 1991 she requested unpaid leave for a period of eight months, with effect from 1 May 1992. This was subsequently extended by two years at the complainant's initiative. At the end of this period she wished to return to the EPO, but there was no suitable post available; her leave was then extended several times by the Organisation for a total of two additional years. She returned to work at the EPO on 1 January 1997 after 4 years and 8 months of unpaid leave.

During her leave she worked as a scientific officer, at a research centre. On 20 January 1997 she submitted a certificate describing the work she performed while on leave and asked the EPO to recalculate her reckonable experience and adjust her grade accordingly. On 24 January the Director of Personnel Management informed her that experience gained during unpaid leave could not "be credited as reckonable experience" and refused her request.

On 14 April the complainant appealed to the President of the Office. On 14 May 1997 he replied that he was unable to grant her request and that he had forwarded it "to the relevant department for appropriate handling as an internal appeal". On 4 June 1998 the Director of Personnel Development informed her that, in fact, her appeal had not been forwarded but that this had been rectified.

The Administration's position paper on the complainant's internal appeal stated that it would be inconsistent with Article 45(3) of the Service Regulations for Permanent Employees of the European Patent Office to credit experience she had gained while on leave; that article specifically prohibits advancement to a higher step or promotion in grade while on leave for personal reasons. It also stated that circular No. 144 of 2 September 1985, which lays down "Guidelines ... for calculating the reckonable experience of A staff for purposes of recruitment and promotion (career system)", shows in paragraph I.1 that only experience prior to recruitment can be taken into account.

In its opinion dated 6 December 1999 the Appeals Committee unanimously recommended rejecting her appeal. On 13 December 1999 the Director of Personnel Development informed the complainant that the President of the Office had rejected her appeal. That is the impugned decision.

B. The complainant makes four pleas in support of her request for a recalculation of her working experience. First, referring to circular 144, she contests the EPO's view that working experience is only taken into account upon recruitment, particularly as the circular specifies that working experience can be considered for both "purposes of recruitment and promotion". Moreover, the circular does not exclude taking into consideration working experience gained during unpaid leave. Secondly, the EPO's reference to Article 45 during the appeal procedure was not justified since she had not asked to be promoted during her leave. Thirdly, since she was promoted to A3 only on 1 October 1999, with a total of eight years credited experience, it was obvious that the experience she gained during her leave had not been taken into consideration, even though circular 144 made that possible. Lastly, she takes issue with the manner in which the Administration has handled her case and, in particular, how it misplaced important documents, which prolonged the process.

She claims a recalculation of her working experience.

C. In its reply the EPO rebuts the complainant's argument regarding circular 144. This circular is intended as a guideline for the implementation of Article 11 (on grade and seniority) of the Service Regulations, which comes under Chapter 3 on recruitment. Calculation of reckonable experience does not take place at any other time during an official's career with the EPO. The Organisation presses its pleas regarding Article 45: when her leave was granted the complainant's attention was drawn to this article which explicitly states that a permanent employee is not entitled to promotion during leave. Therefore, it would be contradictory to credit the experience she gained during her leave for the purpose of granting her a higher step or promotion in grade. As for the promotion she received in October 1999, the EPO points out that 8 years of experience is merely a minimum requirement for a promotion. The Tribunal has repeatedly ruled that promotions are discretionary, and that a promotion is not "automatic" upon reaching the minimum years of experience. Nevertheless, the complainant was immediately promoted upon fulfilling the minimum requirements.

Regarding the complainant's allegation that her case was not handled with due care, the EPO admits that her letter of appeal was "inadvertently" not forwarded in a timely manner. Regret for this had been expressed to her by the Director of Personnel Management following which the appeal procedure had been completed within a reasonable period. In the EPO's opinion there is no reason for allowing the complainant's application for hearings.

CONSIDERATIONS

1. The complainant joined the Organisation on 1 September 1990 with reckonable experience of three years and seven months which entitled her to grade A2-2-7.

2. She was granted unpaid leave from 1 May to 31 December 1992. This was later extended at her request to 31 December 1994. The complainant could not be reinstated at this time as there was no suitable post available. Her unpaid leave was therefore extended and she was ultimately reinstated on 1 January 1997 after a total of four years and eight months of unpaid leave.

3. Before the complainant started her leave her attention was drawn to Article 45 of the Service Regulations which, in its third paragraph, says that an official is not entitled to an advancement to a higher step or promotion in grade while on unpaid leave.

4. When she returned she asked for a recalculation of her "reckonable experience/grade" in view of the experience she had gained at the research centre where she worked during her leave. This was refused on 24 January 1997. Following the unanimous recommendation of the Appeals Committee, the President of the Office rejected her appeal on 13 December 1999. That is the impugned decision.

5. Article 11 of the Service Regulations provides:

> "(1) The appointing authority shall assign to each employee the grade corresponding to the post for which he has been recruited.

> (2) Unless the appointing authority decides otherwise, for duly substantiated reasons relating to the training and special professional experience of the candidate, appointment shall be to the first step in the grade."

6. Circular 144 lays down guidelines for calculating reckonable experience. Section I defines reckonable experience. Section II deals with how to apply reckonable experience in calculating grade and step on recruitment. According to Section III (relating to promotion under Article 49 of the Service Regulations):

> "The calculation provided for under I is also applicable to periods of employment to be ascertained under the career system (step-in-grade upon promotion), subject to the minimum ages laid down in the promotion instructions established by the President."

7. The complainant argues that a calculation of working experience is not restricted to initial employment. She claims this is given only as an example and it is explicitly stated that it applies also to promotion. She says that any reference to Article 45 is unjustified as she did not request promotion during leave. She also claims that when she was promoted to grade A3 on 1 October 1999 her working experience while on leave was "obviously not taken into consideration".

8. What the complainant asked for in January 1997 was the recalculation of her reckonable experience and her grade; in other words she was seeking promotion as a result of experience gained while on unpaid leave. Promotion is carefully regulated under Article 49. This article provides for six different types of promotion, but there is no provision for promotion for having gained additional experience while on leave. Nor is there provision for any recalculation of the calculation made on recruitment. This claim fails.

9. Any criticism the complainant may have about her actual promotion on 1 October 1999 is irrelevant to this complaint. The administrative decision which she disputes and which has gone through the internal appeal process was made in January 1997. A subsequent different decision which is disputed forms a separate cause of action.

10. The complainant criticises the way in which her appeal was dealt with by the Organisation in that they lost some of her correspondence. The Tribunal, however, does not find that her rights were in any way compromised.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 3 May 2001, Miss Mella Carroll, Vice-President of the Tribunal, Mr James K. Hugessen, Judge and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

Mella Carroll

MELLA CARROLL

James

JAMES K. HUGESSEN

Flerida Ruth P. Romero

FLERIDA RUTH P. ROMERO

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

NINETY-FIRST SESSION

***In re* Palma (Nos. 14, 15 and 17)**

Judgment No. 2054

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourteenth complaint filed by Mr Francesco Palma against the European Southern Observatory (ESO) on 30 September 1998, the ESO's reply of 14 December 1998, the complainant's rejoinder of 9 January 1999 and the Observatory's surrejoinder of 27 January 1999;

Considering Mr Palma's fifteenth complaint which he filed against the ESO on 5 October 1998, the Observatory's reply of 14 December 1998, the complainant's rejoinder of 18 January 1999 and the Observatory's surrejoinder of 25 March 1999;

Considering Mr Palma's seventeenth complaint which he filed against the ESO on 9 November 1998 and corrected on 11 February 1999, the Observatory's reply of 23 March, the complainant's rejoinder of 19 April and the Observatory's surrejoinder of 20 May 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings in the context of his fifteenth complaint;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant served on the staff of the ESO from 1 September 1989 to 31 August 1995 as a procurement officer. Further information about his career and facts relevant to this case are set out in Judgment 1665, on his first complaint against the European Organization for Nuclear Research (CERN). Also relevant are Judgments 1718 and 1785, on his first and second complaints against the ESO. While working at the ESO he suffered an eye injury which resulted in substantial loss of sight.

In a letter of 28 March 1998, headed "general application", the complainant asked ESO's Head of Administration to order the Personnel Department to consider him automatically for any available new vacancies suited to his "education, skills and capabilities" with a view to his "reassignment" within the ESO as a handicapped person. In the absence of a reply he appealed to the Director General on 17 May 1998. In his fourteenth complaint he is challenging the implied rejection of that appeal.

On 29 March 1998, citing Article I 3.07[*] of the Combined Staff Rules, the complainant wrote again to the Head of Administration claiming compensation for "insult, outrage, threat, injury and slander" occurring "by reason of [his] duties" in June and July 1995. He referred to events on 28 June 1995 when two officials asked him to gather his personal belongings and "forced" him to leave ESO premises. In the absence of a reply, he appealed to the Director General on 18 May 1998 pressing his claim for compensation. In his fifteenth complaint he is challenging the implied rejection of his appeal.

At an earlier stage on 28 June 1995, the Joint Advisory Appeals Board had met to hear an appeal filed by the complainant on 13 March 1995 relating to an annual step increase. In its report of 21 July 1995 the Board found that management had not "optimally handled" the case "in what concerns the communication to the [complainant], specifically on the assessment of his performance". Part of its recommendation was to "have the failures in this case properly investigated and understood and to take action to avoid their repetition in the future". By a letter of 26 July 1995 the complainant was notified that the Director General upheld the decision not to grant him the step. He subsequently lodged a complaint with the Tribunal seeking "disclosure of information" in relation to the Board's recommendation. It was dismissed as time-barred in Judgment 1785. On 22 June 1998 the complainant wrote to the Director General appealing for a decision, in writing, following the Board's recommendation of July 1995 regarding the handling of his case. In his seventeenth complaint he is challenging the implied rejection of that appeal.

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[*] Article I 3.07 provides in relevant part:

> "The Organization shall protect a member of the personnel, or a former member of the personnel, against any insult, outrage, threat, injury or slander to which he ... may be exposed by reason of his office or duties. In so far as it deems necessary the Organization shall assist him in any measures which he may take against the authors of such acts.
>
> If a member of the personnel, or a former member of the personnel suffers injury by reason of his office or duties, the Organization shall compensate him ..."

B. In his fourteenth complaint the complainant bases his claim to re-employment mainly on Article R II 1.27* of the Staff Regulations, which he submits provides for reassignment of a handicapped staff member. He says that he has a right to such reassignment, particularly as his invalidity occurred while he was employed by ESO and that he was illegally terminated. In not reassigning him, the Observatory is in breach of that provision. If it re-employed him he would have access to health insurance for disability. Had he been allowed an "incapacity pension" after his service was terminated in 1995 he would have had health insurance coverage, but because he was paid "ex gratia benefits" he no longer had health insurance through ESO. He also refers to the Conventions of the International Labour Organization on disabled persons.

He asks the Tribunal to order the quashing of the implied negative decision rejecting his appeal of 17 May 1998 and oblige ESO to reassign him to a "position adequate to his skills, capabilities and 'handicap'". He also claims costs.

In his fifteenth complaint he submits that he suffered "insult, outrage, threat, injury and slander by reason of his duties" in June and July 1995 on the part of officials employed in managerial positions. Under Article I 3.07 of the Combined Staff Rules he could expect "assistance" from the ESO: the Organization had the obligation to identify the authors of the misdeeds and determine what offences were committed. He contends that he was "dismissed" while his disability was still under medical evaluation. ESO "banned" him from its premises on 28 June 1995 even before it had convened "a mandatory" Rehabilitation Board. As a result he suffered physical, material and moral injury, as well as "consequential" injury in the sense that his emotional distress had repercussions on his public life and private life. There was a further breach of duty on the part of the Director General because he did not convene a Joint Advisory Appeals Board.

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* Article R II 1.27 of the Staff Regulations provides in part:

> "When a member of the personnel is handicapped as a result of an illness or accident arising out of or in the course of his duties ... he shall be assigned to duties corresponding to his physical capacities."

He asks the Tribunal to quash the implied negative decision rejecting his appeal of 18 May 1998 and order "the enforcement of ... Rule I 3.07". He also claims costs.

In his seventeenth complaint the complainant is asking for an express final decision from the Director General following the recommendation made by the Appeals Board in its report of 21 July 1995 that the "failures in this case [should be] properly investigated". He bases his claim on general principles of the Charter of the United Nations and Conventions of the International Labour Organization. He submits that in denying him an express decision thereon the Director General is in breach of his duty. He asks the Tribunal to quash the implied negative decision and award him costs.

C. In its reply to the complainant's fourteenth complaint the Observatory contends that the complaint is not well-founded in law. It points out that Article R II 1.27 applies to members of the personnel. It does not apply to former staff members and since the complainant is no longer a staff member he cannot invoke the benefits of the provision. His affliction was not service-incurred and he cannot plead that his service was terminated as a result of his handicap. Moreover, the Tribunal held in Judgment 1665 that the complainant can no longer open issues connected with the end of his appointment.

With reference to the complainant's letter of 28 March 1998, to the Head of Administration, the Observatory states that the Staff Regulations set out specific procedures for the filling of vacancies. They contain no provision for the filing of a "general application" for a vacant post. Indeed, it would amount to giving an applicant preferential treatment. In granting *ex gratia* benefits, the Pension Fund went some way towards easing the complainant's situation.

In its reply to his fifteenth complaint the Observatory asserts that the complaint is not receivable. The substantiation of a claim constitutes a condition of receivability; however, the complainant's allegations of "insult, outrage, threat, injury and slander" are not backed up by any proof and are not based on fact.

It submits that, in any event, the complaint is devoid of merit. Throughout his employment the complainant was treated according to the applicable rules, and the ESO is not aware of any "incorrect act" committed against the complainant by any of its officials. It considers his accusations as "preposterous and querulous". It cites Article R VIII 1.01 of the Staff Regulations, according to which a claim for payment is not admissible if it is made more than two years after payment became due. Even if the complainant had suffered moral injury in 1995, he had forfeited his right to payment of compensation by the time he made his claim.

In its reply to his seventeenth complaint the Observatory says that the complaint is devoid of merit. In asking for a final decision from the Director General the complainant is merely seeking to have his case reopened. He is seeking redress for administrative decisions, taken in 1995, refusing him a step increase and terminating his contract. Those decisions are now closed matters as the time limits for bringing them for review by the Tribunal have long since expired.

D. In his rejoinder on his fourteenth complaint the complainant submits that he did not expect the ESO to act in breach of the competition procedure. He simply wanted to "compete" in the procedure, and be considered as an applicant for suitable vacancies. He maintains that the Director General should have referred his appeal of 17 May 1998 to the Joint Advisory Appeals Board.

In his rejoinder on his fifteenth complaint he presses his plea that following the insult and injury that he suffered his case should have been heard by the internal appeal body; under Article VI 1.03 of the Staff Rules the Director General has a duty to consult the Joint Advisory Appeals Board before taking a decision on his case. He argues that his claims for redress cannot be limited by Article R VIII 1.01, cited by the Observatory. That article refers to administrative claims such as salary issues, but he is seeking redress for "criminal breaches" and there is no time restriction for lodging such claims. On the grounds that he wants to avoid misunderstanding on the relief claimed he rephrases his claims. He is henceforward seeking only the quashing of the implied negative decision and costs.

In his rejoinder on his seventeenth complaint the complainant presses his pleas.

E. In its surrejoinder on his fourteenth complaint the Observatory states that the ESO rules do not contain any provision justifying the complainant's claim to be considered for vacancies. Moreover, it is not aware of any general principle of international civil service law under which his claim could succeed. It states, however, that the complainant is free to apply for any vacancy which he sees advertised.

In its surrejoinder on the complainant's fifteenth complaint it points out that, contrary to what the complainant claims, the Director General was not under any obligation to refer his case to the Appeals Board. Article R VI 1.02 of the Staff Regulations, relied on by the complainant in that connection, applies to "members of the personnel". He is not now a member of ESO's staff and was not on the staff in 1998 when the Observatory chose not to reply to his request of 29 March. The complaint is moreover time-barred. It was filed outside the time period for filing a complaint allowed under Article VII(3) of the Tribunal's Statute.

Article I 3.07 of the Staff Rules, which the complainant invokes in support of his claims regarding insult and injury, obliges the organisation to protect a staff member against injury suffered by reason of a staff member's duties. He alleges no such injury.

In its surrejoinder on the complainant's seventeenth complaint the Observatory objects to certain statements made by the complainant in his rejoinder and argues that the complainant is misusing "his procedural rights".

CONSIDERATIONS

1. The three complaints filed by the complainant with the Tribunal against the ESO, involving the same parties and a common factual background, are joined to form the subject of a single ruling.

2. The complainant entered the service of the ESO on 1 September 1989. By a letter of 26 January 1995 the Head of Personnel informed him that "... on the basis of the recommendation by the Contract Advisory Committee, it has been decided not to offer [you] an indefinite contract. ... [your] actual contract will come to its natural end and will not be renewed or extended beyond 31 August 1995." The complainant did not appeal against that decision.

In a memorandum of 6 June 1995 to the Head of Administration the complainant reported that he had lost the sight of his left eye and wanted his case to go to the Rehabilitation Board. An ophthalmologist determined the injury to be "unforeseeable and unpreventable".

3. Judgment 1665 of 10 July 1997 addressed the complaint filed by the complainant against the European Organization for Nuclear Research (CERN) as a participant in the CERN's Pension Fund. In that complaint he sought to be awarded a pension for total incapacity and all related benefits; however, the Tribunal upheld the "*ex gratia* benefits equivalent to a partial incapacity pension of 40%" that he was awarded by the Governing Board of the CERN Pension Fund instead of an "unsuitability pension".

4. In Judgment 1718, of 29 January 1998, the complainant challenged the implied rejection of two requests, one for a post and the other for medical coverage, which he made in letters written to the Director General

of ESO. He asked the Tribunal to compel the Director General to take express decisions on his requests. The complainant misunderstood the purpose of Article VII(3), of the Tribunal's Statute, which is about the implied rejection of a claim. The Tribunal dismissed the complaint on the ground that: "There is no provision for applying to the Tribunal for an order to the Director General to state a negative final decision."

5. In his second complaint filed against the ESO, which led to Judgment 1785 of 28 January 1999, the complainant asked the Tribunal to order "disclosure of information and delivery of copy of all documents" concerning his case, "following and in relation with the ESO [Joint Advisory Appeals Board's] recommendation report dated July 21, 1995". In that report the Board pointed out that in one respect his case had not been "optimally handled" by ESO management. Its recommendation was to "have the failures in [the] case properly investigated and understood and to take action to avoid their repetition in the future".

In Judgment 1785 the Tribunal dismissed the complaint. It ruled that the complainant could no longer challenge the administrative decisions at issue because the time limits for challenging them had "long since expired" and there were "therefore no grounds in law for ordering disclosure of material on [the] issues".

Fourteenth complaint

6. The complainant wrote to the Head of Administration on 28 March 1998 asking that he be "automatically" considered for "all first available vacancies at ESO, which are adequate to [his] education, skills and capabilities", with a view to his reassignment at ESO "in quality of a heavy handicapped from the Organization".

7. As he did not receive a reply to his letter of 28 March 1998, he appealed to the Director General on 17 May. Having received no reply again, he filed his fourteenth complaint against the ESO asking that the implied negative decision of the Director General be quashed.

8. In asking for reassignment, he invokes Article R II 1.27 of the Staff Regulations, national laws, Conventions of the International Labour Organization and certain legal principles.

9. In its reply the ESO points out that Article R II 1.27 of the Staff Regulations applies only to the organisation's members of the personnel and not to former staff members; that the complainant's ailments were not service-incurred; and that he was not terminated because of his handicap. In any event, the Staff Regulations recognise no right on the part of a person, not even a former staff member, to file a "general application" for a vacant post. The applicable regulations require the Director General to issue a vacancy notice for each vacant post and that it shall be published and made known to personnel of the ESO and the member States.

10. The Tribunal is unable to agree with the complainant that as a disabled former staff member he is entitled to a right to reassignment. There is no basis in the Staff Regulations for conferring on him a preferential status. As with any job applicant, he has to follow the procedures and apply for any desired vacant post. To rule otherwise would, in effect, introduce an amendment to the applicable rules to unduly favour disabled former staff members. As the Tribunal has held in Judgment 637 (*in re* Jansen) the staff (much less former employees) "may not demand amendment of the rules governing their employment". Therefore, his fourteenth complaint must be dismissed.

Fifteenth complaint

11. In a letter of 29 March 1998, addressed to the Head of Administration, the complainant claimed damages for having suffered "insult, outrage, threat, injury and slander" by reason of his duties in June and July 1995 at the hands of certain officials of the organisation, in violation of Article I 3.07 of the Combined Staff Rules which states:

> "The Organization shall protect a member of the personnel, or a former member of the personnel, against any insult, outrage, threat, injury or slander to which he … may be exposed by reason of his office or duties. … the Organization shall assist him in any measures which he may take against the authors of such acts.

> If a member of the personnel or a former member of the personnel suffers injury by reason of his office or duties, the Organization shall compensate him ..."

12. When he did not receive a reply to his letter of 29 March 1998 he appealed to the Director General on 18 May. Having received no reply from him he filed his fifteenth complaint against the ESO asking for the quashing of the implied "negative" decision of the Director General.

13. The Tribunal finds the complainant's allegations of physical, material, moral and "consequential" injuries unsubstantiated and his arguments convoluted and baseless. Even assuming his claims were true, the acts he complains of occurred when he was still employed by ESO more than three years before he filed his fifteenth complaint; hence, his claim is irreceivable.

Seventeenth complaint

14. This complaint adverts to the one on which the Tribunal ruled in Judgment 1785.

15. The complainant charges the Director General with "breach of duty" in not taking action on the Joint Advisory Appeals Board's recommendation of 21 July 1995 to have the failures in his case "properly investigated and understood". He wants to have an express decision of the Director General to bring before the European Court of Human Rights and before "public opinion" so that he could finally have "an effective remedy for his violated fundamental human rights".

16. Since the Director General did not reply to his letter of 22 June 1998, the complainant now asks the Tribunal in his seventeenth complaint against the ESO to quash the implied negative decision.

17. The ESO submits that the complaint is devoid of merit. The complainant merely wishes to reopen his case and seeks redress for the administrative decisions taken in 1995, but the issues of fact and law in this complaint do not differ essentially from those decided by the Tribunal in Judgment 1785.

18. The Tribunal cannot but agree with the defendant organisation. Indeed, the numerous complaints filed by the complainant are but pointless attempts to get the Tribunal to review its past rulings based on actions taken several years ago. As his seventeenth complaint is clearly time-barred and unfounded it is irreceivable.

19. The Tribunal also considers that the complainant has abused the right of appeal under the Tribunal's Statute.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 27 April 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

Michel Gentot

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

Flerida Ruth P. Romero

FLERIDA RUTH P. ROMERO

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL
GENEVA

NINETY-FIRST SESSION

***In re* Meyer** **Judgment No. 2055**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Thomas Paul Christian Meyer against the European Patent Organisation (EPO) on 24 September 1999 and corrected on 14 April 2000, the EPO's reply of 14 July, the complainant's rejoinder of 31 October 2000 and the Organisation's surrejoinder of 22 February 2001;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who is of German nationality and was born in 1964, joined the European Patent Office, the EPO's secretariat, in 1991 as an assistant examiner at grade A1 in Directorate-General 2 (DG2). In April 1993 he was promoted to grade A2. At the material time he was a substantive examiner in directorate 2.3.12.

On 4 February 1997 the Director of that directorate met with the complainant to discuss his performance. He mentioned specific shortcomings in the complainant's work and warned him that, if there was no improvement, he could expect a rating of "less than good" in his staff report for 1996-1997. After the meeting, he summarised their discussion in a document entitled "Job Performance Review 1996". Under the heading "Future Action" the Director set out two courses of action which would be adopted initially for a period of six months. The first required the complainant, in the event of disagreement between him and the chairman of an examining division, to express his view in writing so that, if necessary, the question could be decided at a division meeting. As a second measure, the Director would not allocate any "oppositions" (to the granting of patents) to the complainant as "first member" of an examining division; those he had started would be reallocated. On 22 April 1997 the complainant appealed to the President of the Office asking that these measures be rescinded; he asked for the job performance review to be "invalidated" and removed from his personal file. The President informed the complainant on 28 May 1997 that he could not allow his request. It was referred to the Appeals Committee and registered as appeal No. 49/97.

At his own request, the complainant changed to a different directorate within DG2 on 1 January 1998. He signed his staff report for 1996-1997 on 22 July 1998.

In its report of 16 June 1999 the Appeals Committee unanimously recommended rejecting his appeal. The President of the Office endorsed their view and the complainant was so informed in a letter from the Director of Personnel Development on 23 June 1999. That is the impugned decision.

B. The complainant pleads that the job performance review was "illegal" and triggered a "slander campaign" against him; it contained "empty assertions". His director has not put forward any convincing evidence for his alleged serious weaknesses.

He argues that, in accordance with Article 24(2) of the Service Regulations, it was his duty to contest any order from a superior which he thought was "defective". He considered some orders he received to be "impracticable". The corrective measures instituted by his director ran counter to the provision on examining divisions in the European Patent Convention; certain patent application cases were reallocated to other examiners and "hidden" from him. The staff report, to which the review ultimately led, "contained contradictory box markings". If those ratings had been more favourable he would have been promoted to grade A3 in 1999.

The complainant argues that the "Job Performance Review 1996" infringed the General Guidelines on Reporting inasmuch as these stipulate that the staff member should be notified of any weakness "as early as possible". Since the weaknesses identified therein were allegedly so serious, the measures mentioned in the review should have been taken earlier to prevent a decline or "stagnation" in his performance. His director should also have provided adequate training.

The complainant takes issue with the fact that, although the Service Regulations state that a complainant may claim the assistance of the translation department when filing a complaint with the Tribunal, he was denied such assistance and had to use an outside translation service at his own expense.

He asks the Tribunal to: (1) declare the job performance review "invalid" on the grounds that there was no factual basis for the shortcomings referred to therein; (2) declare it "invalid" because the measures contained in it were taken too late; (3) declare the measures "invalid" since they were not suited to remedying his alleged weaknesses, and indeed were withdrawn in December 1999; (4) declare his staff report for 1996-1997 "invalid"; (5) order the EPO to produce a new report with all ratings raised to "good"; (6) order the EPO to promote him retroactively from 1 April 1999; (7) award him moral damages at least equal in amount to his expenses – he suggests the sum of 100,000 German marks; and (8) grant him any benefit arising from "any possible legal aspect".

C. In its reply the Organisation observes that the complainant does not explicitly ask for the quashing of the impugned decision. It assumes, however, that the complainant is mainly seeking the setting aside of that decision and subsidiarily the redress he claims.

It contends that the complaint is in part irreceivable. The complainant filed his appeal on 22 April 1997 and, on 27 May 1999, put forward five supplementary claims in submissions filed in reply to the position paper of the Administration. He repeats them in the first five claims brought before the Tribunal in this complaint, but they are out of time since they were made more than two years after the complainant received the challenged job performance review. They were irreceivable in the context of his internal appeal and are irreceivable now in his complaint to the Tribunal. Moreover, his claims relating to his staff report for 1996-1997 are irreceivable for failure to exhaust the internal means of redress, because he has challenged the report in two further appeals which have yet to be taken up by the Appeals Committee. They are also outside the ambit of appeal 49/97 on which the present complaint is based. So too are his claims to promotion and to damages.

On the merits, the EPO says it gives no credence to the complainant's assertions that he was the victim of a slander campaign. As was recognised by the Appeals Committee, a director is allowed discretion in assessing a staff member's performance and has to ensure the smooth running of a department. The complainant was simply unwilling to comply with his director's instructions.

The job performance review in question was drawn up in line with the General Guidelines on Reporting which provide that a warning should be given in cases where a staff member is at risk of getting a rating of less than "good" in a staff report. He received adequate warning about the shortcomings in question. Even in 1996, the complainant's director commented orally whenever he came across a problem in a file processed by the complainant. The complainant was therefore not unaware that his performance was lacking. Furthermore, the document at issue was drawn up after discussing the matter with the complainant and was sufficiently motivated.

D. In his rejoinder the complainant notes that the Organisation has not produced any written evidence of the alleged serious deficiencies in his performance. He takes up the matter of the "campaign" against him, referring to an instance when he was "insulted and physically approached by a colleague".

Although he does not ask for the repayment of translation costs, he says that these were a consequence of the campaign mounted against him. He would like any sum awarded as moral damages to cover those translation costs. He suggests a lower sum (5,800 German marks) than that claimed as indicated under B – which could possibly be "split between different complaints".

E. In its surrejoinder the Organisation maintains the submissions made in its reply. In its view it was ultimately the complainant's attitude which led to the failure of the various measures taken by his director. It points out that the Appeals Committee found no fault with the measures set in place. On the subject of the alleged physical assault the EPO produces two documents describing the incident, rebutting the complainant's allegation, and showing that it was rather other officials who had to bear the brunt of verbal attacks made by the complainant.

CONSIDERATIONS

1. The complainant joined the staff of the European Patent Office on 1 April 1991 as an assistant examiner, at grade A1, assigned to Directorate-General 2. On 1 April 1993 he was promoted to the grade of A2. On 1 January 1996 the complainant was transferred to directorate 2.3.12.

2. On 4 February 1997 the Director of directorate 2.3.12 drafted a "Job Performance Review 1996" in which he outlined the complainant's shortcomings and the measures he thought were necessary to remedy the situation. On 14 February 1997 the complainant wrote to the Director objecting to the assessment and measures and asking that the measures be rescinded. The request was not met.

3. On 22 April 1997 the complainant appealed to the President of the Office requesting that the "Job Performance Review 1996" be considered devoid of substance and removed from his personal file and that the measures taken by the Director be rescinded. In support of this request, the complainant argued that the review violated the principle of equal treatment, as well as his right to "unbiased and objective evaluation and treatment".

4. By a letter dated 28 May 1997 the President informed the complainant that he could not allow his request. It was referred to the Appeals Committee, which recommended that the appeal be rejected on the basis that it lacked foundation. The President endorsed the Committee's unanimous recommendation on 23 June 1999. That is the impugned decision.

5. The complainant's staff report for 1996-1997 was handed to him on 19 March 1998; in it his performance was generally assessed as "unsatisfactory". The complainant filed an internal appeal against that report which was referred to the Appeals Committee.

6. The complainant makes a number of claims which are set out under B above. Claims (4) and (5) relate to his staff report for 1996-1997. The internal appeal that the complainant lodged against it was, at the material time, still pending. The Appeals Committee was asked to consider the legality of this report in the present case but declined to do so, stating: "The question of whether this assessment for 1996/97 is legally disputable is to be examined in [other appeals – Nos. 39/99 and 40/99]". The complaint is, therefore, irreceivable with regard to those two claims.

7. In his sixth claim the complainant asks to be promoted. This relief was not claimed before the Appeals Committee. The claim is irreceivable for failure to exhaust the internal means of redress.

8. The complainant argues, basically, that the Organisation presented no evidence of his purported shortcomings and that the measures were not appropriate.

9. As can be ascertained from reading the disputed job performance review, that document was the result of the repeated negative oral feedback about the complainant's work and conduct received by his director. The latter stated therein that the complainant's shortcomings amounted to "a consistent pattern which [he could] not ignore as it [was] creating a disruptive atmosphere within the Directorate" and it was not possible for him to sort out the problem on a case by case basis; he had no other choice than to take the measures described in the job performance review. Contrary to the complainant's allegations, that document is neither "insulting" nor can it be said to be "disregarding objectivity". It clearly points out the complainant's shortcomings and even underlines the positive quantitative aspects of the complainant's work. The Director was fulfilling his duty to warn the complainant that his job performance fell short of what could be expected and that he would have to improve, otherwise his ratings would be affected.

10. The complainant finds fault with the Organisation for not having filed any specific evidence of his shortcomings. He misapprehends the nature of the burden which falls upon him. It is for him to demonstrate, by evidence, that there are proper grounds for interfering with his superior's reasoned evaluation of his work, an exercise which is quintessentially one of judgment and discretion. He has signally failed to do so.

11. The complainant has not, contrary to his assertions, provided "explicit counterevidence" to support his own views. He submitted letters from patent attorneys thanking the examiner who had processed a particular application (the complainant in that case). This does nothing to advance his claim. In the absence of any evidence on the part of the complainant demonstrating any reviewable error, the defendant Organisation does not have anything to rebut.

12. The complainant has also invoked Article 24(2) of the Service Regulations in order to justify his behaviour. Article 24(2) reads as follows:

> "Should an order received by a permanent employee appear to him irregular, or should its execution seem to him likely to have undesirable consequences of a

> serious nature, he shall convey his opinion to his immediate superior, in writing if necessary. If the latter confirms the order in writing the employee shall carry it out, unless its execution would constitute an act contrary to the criminal law in force in the country of which the employee is a national or in the country in which the order is to be executed."

13. This text has no application whatever to the facts of the present case and the complainant's reference to this article to justify his repeated reluctance to correct files in accordance with his director's instructions is unacceptable. This provision cannot serve as justification for lengthy discussions each time the complainant's director asks him to correct a file. In any event, the complainant has not filed any specific evidence where illegal or "impracticable" orders were given to him. His mere assertions are not sufficient.

14. The complaint should therefore be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 3 May 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL
GENEVA

CATHERINE COMTET

NINETY-FIRST SESSION

***In re* Meyer (No. 2)** **Judgment No. 2056**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr Thomas Paul Christian Meyer against the European Patent Organisation (EPO) on 24 September 1999 and corrected on 14 April 2000, the EPO's reply of 14 July, the complainant's rejoinder of 31 October 2000 and the Organisation's surrejoinder of 22 February 2001;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relating to the complainant's employment at the European Patent Office, the EPO's secretariat, are set out in Judgment 2055 also delivered this day, in which the Tribunal ruled on his first complaint. At the material time he was assigned to Directorate-General 2 (DG2). On 1 January 1998 he transferred from directorate 2.3.12 to 2.3.09.

In a document headed "Job Performance Review 1996", dated 4 February 1997, the Director of directorate 2.3.12 criticised aspects of the complainant's way of working and specified two courses of action that were to be adopted. One of those measures entailed no longer allocating him "oppositions" (to the granting of patents) as "first member" of an examining division; those he had started would be reallocated. The situation was to be reviewed after six months. In a note of 27 August 1997 the Director warned the complainant that since there were no signs of improvement he would have to withdraw specific patent applications from him and reallocate them to another examiner. So he did on 28 October and 4 November.

The complainant wrote to the Director on 12 December 1997 asking to be allowed to inspect certain files. He said he wished to take note of the working practice expected of him and be able to inspect the files relating to applications withdrawn from him. He sent a copy of the same request to his Principal Director. The latter replied on 15 December 1997 that permission was not granted, and on 13 March 1998 the complainant appealed to the President of the Office against that decision. On 13 May the Administration informed him that the President could not meet his request and was referring it to the Appeals Committee. It was registered as appeal No. 31/98.

By letters dated 27 May and 19 June 1998 the complainant requested, pursuant to Article 128 of the European Patent Convention and as a national of a contracting state, to be able to inspect certain files relating to European patent applications. By letters dated 24 and 25 June the complainant lodged further "appeals" because these requests were not processed within the required ten days. They were subsequently registered as internal appeal No. 79/98.

The Director of Personnel Management informed him on 1 July 1998 that his request for inspection had been allowed, but he made it clear that, if the complainant used the material so obtained against any of his colleagues, disciplinary action would ensue. In view of the authorisation the Administration had given the complainant, it assumed that his appeals had become without subject. On 20 August 1998 the complainant indicated that his appeals could not be regarded as settled because his request for inspection also related to Patent Cooperation Treaty (PCT) applications and the European Patent Convention did not provide for an opportunity to inspect these. He therefore maintained his appeals.

The Appeals Committee reported on 16 June 1999, stating that it was not competent to decide on appeal No. 79/98 and recommending the rejection of appeal No. 31/98 as unfounded. On 23 June 1999 the Director of Personnel Development informed the complainant that the President had endorsed the Committee's recommendation and rejected his appeals. The complainant impugns that decision.

B. The complainant submits that it was his former director's duty to allow him to inspect the files in question. He was denied the opportunity to treat them as sample solutions, i.e. as a model for future files which he would have to process. Instead, the files were "hidden" from him. He was also denied the opportunity of using them as counter-evidence on the matter of the alleged shortcomings in his performance.

He points out that, in his capacity as "citizen" and as allowed by Article 128 of the Convention, he had been able to inspect the public part of some of the files that had been withdrawn from him, but such inspection was subject to payment of fees. By intimating that he could face disciplinary action if he uses information gleaned from the inspections against colleagues the Administration has placed him in a position where he is unable to defend himself against the slander campaign set in motion against him (at issue in his first complaint) and unable to produce the necessary counter-arguments in his submissions to the Tribunal.

He asks the Tribunal to rule that: (1) it was inadmissible in 1997 to deprive him of his right to inspect files which he had previously begun to process; (2) he should have been granted permission, in 1997, to inspect files of fellow examiners in directorate 2.3.12; (3) it was inadmissible to deny him access to files that he had begun to process because he needed them for evidence to support his appeal against his 1996-1997 staff report; (4) he was justified in seeking permission to consult files of fellow examiners as such files were also "relevant as evidence" in the context of that appeal; (5) he has the right to use copies of files – obtained against a fee – as evidence in his appeal challenging his staff report; (6) he should be granted the right to inspect and photocopy files that he had begun to process – particularly the non-public part; and (7) he should be granted the right to inspect and photocopy the files processed by fellow examiners in directorate 2.3.12 – particularly the non-public part. He also asks the Tribunal: (8) to award him moral damages in an amount which at least corresponds to his expenses – he suggests the sum of 20,000 German marks; (9) to grant him any benefit arising from "any possible legal aspect of the matter"; and (10) to order that he be allowed to use any public information obtained under the European Patent Convention in any complaint he lodges with the Tribunal.

C. In its reply the Organisation notes that the complainant does not ask explicitly for the quashing of the impugned decision. It assumes, however, that the complainant is mainly seeking the quashing of that decision and subsidiarily the redress he claims.

It submits that the complaint is irreceivable in part. His claims relating to the inspection of files under Article 128 of the Convention and the reimbursement of the corresponding costs are not receivable since the Appeals Committee is not the competent body to decide on such requests; neither is the Tribunal. In his present complaint the complainant reiterates seven claims that he made on 27 May 1999 during the internal appeal procedure, after receiving the position paper of the Organisation. They constituted supplementary claims and were an inadmissible extension of the initial claims put forward in his appeal. Furthermore, since he made them some eighteen months after the initial decision was taken to refuse him access to the files, they have to be rejected as being out of time both in respect of his internal appeal and this complaint. The complainant did not seek damages in his initial appeal and so his claim for an award for moral injury is also irreceivable. His claim for the grant of all possible legal benefits is superfluous.

On the merits, the EPO argues that the complaint is unfounded. The question at issue is whether his former director was right, in December 1997, to refuse the complainant access to the files that had been withdrawn from him owing to his unwillingness to correct them in accordance with instructions given. Such a decision falls within the ambit of a director's discretionary power. The Administration feared that the complainant might use information gained from inspecting the files against the colleagues to whom his work had been reallocated, and so its decision to restrict his access to the files in question was fully justified. The complainant's argument that he wished to consult the files to learn from them is not credible.

Although he was made aware that misusing material obtained from files could make him liable for disciplinary action, that in no way restricted his right to present a proper defence. It was a reminder to him that, as a staff member, he has a general obligation to behave in line with the Organisation's interests.

D. In his rejoinder the complainant presses his pleas. On the issue of receivability he says that his first seven claims are "self-evident refinements of the same basic subject matter". After he changed directorate in January 1998 there was a shift in the grounds for his appeal and he no longer had any interest in inspecting files in order to discuss matters arising therefrom with colleagues. He consequently made it clear in the claims submitted during the internal appeal procedure that the first two related specifically to 1997.

As in his first complaint, he wants the Tribunal, in considering his claim to moral damages, to take into account the translation costs he incurred.

E. In its surrejoinder the Organisation presses its objections to receivability. In connection with the requests to inspect files, made by the complainant on 27 May and 19 June 1998, it points out that it is the Legal Board of Appeal of the European Patent Office which is responsible for handling disputes relating to the inspection of files pursuant to Article 128 of the European Patent Convention.

CONSIDERATIONS

1. On 4 February 1997 the Director of directorate 2.3.12, in which the complainant then worked, drafted a "Job Performance Review 1996" in which he outlined the complainant's shortcomings and the measures he thought were necessary to remedy the situation. The complainant filed a

complaint before the Tribunal against the review. That proceeding forms the subject matter of Judgment 2055, also delivered this day.

2. The complainant's staff report for 1996-1997 was handed to him on 19 March 1998; in it his performance was generally assessed as "unsatisfactory". The complainant filed an internal appeal against that report. At the material time that appeal was still pending.

3. In a note dated 27 August 1997 the Director informed the complainant that there had been no improvement in his performance with respect to quality and attitude at work, that there had instead been a deterioration in many of the cases he had treated, and that he would, therefore, have to expect an assessment of "unsatisfactory". The Director had decided therefore that the examining division would take back two applications from the complainant and reallocate them to another first examiner. On 28 October the Director informed the complainant that he had to withdraw four Patent Cooperation Treaty applications from him and reallocate them to other examiners because three of them had "exceeded their limit dates". On 4 November the Director discharged the complainant from the processing of ten further applications because of the uncertainty of the date of the complainant's return from sick leave.

4. On 12 December 1997 the complainant asked the Director to give him the opportunity to check all the files he wished to consult so that he could take note of the working practice demanded of him. He also requested permission "to inspect ... the files of the applications [that had been] withdrawn from [him]".

5. The complainant sent a copy of this same request to his Principal Director. The latter replied, on 15 December 1997, that he could not meet the requests. The complainant appealed the decision by an internal appeal sent to the President on 13 March 1998. It was subsequently registered as appeal No. 31/98.

6. The complainant, on 27 May and 19 June 1998, had also launched parallel proceedings pursuant to Article 128 of the European

Patent Convention as a German national, and had asked to inspect eight files relating to European patent applications. By letters dated 24 and 25 June, the complainant lodged what he called "appeals" before the Appeals Committee (registered as appeal No. 79/98) because his request to inspect the files had not been processed within ten days. On 1 July 1998 the Director of Personnel Management informed the complainant that his request to inspect those files had been allowed.

7. In its report dated 16 June 1999 dealing with the two appeals (Nos. 31/98 and 79/98), the Appeals Committee correctly considered the disputes concerning the inspection of files pursuant to Article 128 of the European Patent Convention, as well as the reimbursement of costs generated by these inspections, as not falling within its competence. Insofar as the matter concerned appeal No. 31/98 the Committee recommended that the appeal be rejected as being unfounded. By a letter of 23 June 1999 the complainant was informed that the President rejected the two appeals. That is the impugned decision.

8. The complainant makes a number of claims as set out under B above; some of them are outside the scope of the litigation before the Tribunal.

9. Claims relating to the inspection of files pursuant to Article 128 of the Convention as well as to the reimbursement of the corresponding costs are clearly irreceivable since the Appeals Committee is not the competent body to decide on such requests.

10. The complainant alleges that the EPO, in the letter dated 1 July 1998, threatened to take "disciplinary action under Article 93 of the Service Regulations" if he "in any way whatsoever, either directly or indirectly", uses "any information obtained through this inspection [under Article 128 of the Convention] for making comments on the work of any colleague in the EPO". He alleges that he is thus prevented from presenting any "counter-argumentation" before the Tribunal and asks, in his tenth claim, for a declaration that:

> "The complainant is allowed to use any public information legally obtained under the European Patent Convention before the present Tribunal within any legal complaint procedure, in particular in a complaint procedure arising [from] the possible rejection of [appeal No. 40/99, relating to his staff report for 1996-1997] which is still pending."

11. The complainant was notified that using information gained from inspecting files could make him liable to a disciplinary sanction but that in no way amounts to a restriction of his right to present a proper defence. This notification was only a reminder of the complainant's obligation as a member of the staff to behave in line with the interests of the Organisation. In any event, files obtained under the Convention could not have been used in the context of the present complaint, which purports to examine the legality of the Director's exercise of discretion. To the extent that it relates to the appeal pertaining to the 1996-1997 staff report, claim (10) is irreceivable in this matter.

12. Claims (3), (4), (5) and (8) are irreceivable since they were not part of the appeal on which the present complaint is based. As for Claim (9) it is superfluous.

13. Thus, the basis of the present complaint (see claims (1), (2), (6) and (7)) is the complainant's internal appeal No. 31/98, which in turn refers to his letter dated 12 December 1997 to his director, in which he requested to be allowed to inspect files that had been taken out of his hands as well as those processed by some of his colleagues.

14. The complainant made his request to be allowed to inspect the files on 12 December 1997 in the following terms:

> "I hereby request you ...
>
> 1. to allow me to inspect all the files I wish in order to enable me to also take note of the working practice you demand of me.
>
> 2. but at least to enable me to inspect the condition of the files of the applications you have withdrawn from me ..."

15. The reply was sent in the following terms:

> "I'm afraid I cannot comply with your requests for the following reason: unless an examiner is a member of the examining division it is not normally allowed to

> have access to cases of other examiners for comparison purposes unless the Director decides otherwise.
>
> In this case I see no reason to make an exception."

16. The Appeals Committee determined that the complainant's wish to check his work independently by means of other files, upon consideration of his superior's instructions and demands, was basically justified. Furthermore, the Committee doubted the Administration's argument that an examiner does not, in principle, have the right of access to files processed by other examiners. In its opinion, it is "much more feasible for each examiner to be allowed access to all patent applications he requires to fulfil his duties". Nevertheless, the Committee held:

> "The standpoint presented by the Administration that disagreements had to be prevented within a Directorate did, however, justify the limitation of free access to the patent applications of the Office on principle. Grounds for concern that such disagreements might arise had to be set forth in individual cases.
>
> It is the superior's duty to decide freely, after due assessment of the circumstances, whether disputes may be feared within the Directorate in this present case if the appellant is allowed to inspect files (which have been withdrawn from his responsibility). The decision of the Head of Principle Directorate 2.3 cannot be opposed in this case. The [job performance review] of 4th February 1997 contains specific evidence that allowing the appellant to inspect patent applications which are currently being processed by other examiners of his Directorate could lead to problems within the Directorate. The appellant particularly requests permission to inspect those files which have been withdrawn from his responsibility. The superior has ascertained reluctance on the part of the appellant to cooperate, not only in individual cases, but as a 'consistent pattern' ... The situation had not improved by August 1997 and it was ascertained in many cases that it had become worse. As a result, the appellant was not permitted to work on a number of cases. It cannot be objected to if the appellant is prohibited in this specific case from inspecting patent applications, the processing of which has been taken over by other examiners of the Directorate.
>
> The argument put forward by the appellant is not convincing that he wanted the files in question as model solutions for reviewing and improving his work. In his statement in appeal proceedings [No. 49/97, at issue in Judgment ..... on his first complaint], he has stated the goal direction of this present internal appeal; the appeal is directed 'against the withholding of evidence'."

17. It appears that the Committee considered the Director's decision as being one which fell within his general discretionary authority to act in the best interests of the department. It was also clearly of the view that the complainant's request for access was colourable. In the circumstances, and

whether or not the Committee was right in saying in its report that examiners have a general right of access to the non-public parts of files which are not under their immediate responsibility (as to which the Tribunal expresses no opinion), it has not been shown that the Director exercised his discretion wrongly.

18. The case law of the Tribunal is clear about the scope of its power of review of discretionary decisions. In Judgment 1969 (*in re* Wacker) under 7, the Tribunal held that:

> "... the Tribunal will quash [a discretionary] decision only if it was taken without authority, or if it was tainted with a procedural or formal flaw or based on a mistake of fact or of law, or if essential facts were overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence."

19. The complainant has not filed any evidence that would indicate that any of the grounds for review was present.

20. There being no grounds upon which the Tribunal could set aside the impugned decision, the complaint must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 3 May 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative

NINETY-FIRST SESSION

***In re* Argos (No. 4), Eritja (No. 4) and Glöckner (No. 5)**

Judgment No. 2057

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaints filed by Mr Patrick Argos and Mr Ramon Eritja, and the fifth complaint filed by Mrs Godefrida Cornelia Glöckner against the European Molecular Biology Laboratory (EMBL) on 2 August 2000, in which they apply in part for the execution of Judgments 1682 and 1887, the EMBL's reply of 2 November, the complainants' rejoinder of 6 December 2000 and the Laboratory's surrejoinder of 9 January 2001;

Considering the applications to intervene filed by:

G. Coomber
M. Cuq-Beutler
A. Gantner
N. Hassler
J. Jonkmay
A. Ökmen
G. Ritter
N. Salmon
E. Schechinger
H. Scholten
L. Schupp
M. Schupp
S. Sheldon
S. Stanarevic
A. Stegmüller
E. Stelzer
C. Stettner
A. Sulayici
J. Swoger
J. Tooze
A. Weck
S. Winkler
W. Winkler
H. Wittmann
D. Young;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Since 1 January 1982 the EMBL has been using the system of the Coordinated Organizations[*] as a standard of reference for the adjustment of staff pay. On 28 June 1995 the Council of the Laboratory, deeming that it was not bound by the decisions of the Coordinated Organizations or by the recommendations of their Coordinating Committee on Remuneration (hereinafter "the Coordinating Committee"), adopted a resolution rejecting the recommendations made in the Coordinating Committee's 40th report and approving, as from 1 July 1995 only, those contained in the 45th report but without applying the downward adjustments proposed therein. In Judgment 1682 (*in re* Argos and others) of 29 January 1998, the Tribunal quashed the Director-General's decisions rejecting the internal appeals which ten staff members, supported by one hundred and sixty-nine others, had filed against a memorandum notifying them of the Council's decisions. Following that judgment, the Council decided on 2 July 1998 not to alter the previously determined adjustments of their pay for 1995. However, in Judgment 1887 (*in re* Argos No. 3 and others) of 8 July 1999, the Tribunal, ruling on an application for execution, sent the cases back to the EMBL and invited it to take the decisions set out in the judgment under 12, which provided inter alia that:

> "The Laboratory must therefore apply the decisions for the period in question. The evidence shows that the Council's Resolution of 2 July 1998 does not satisfactorily execute Judgment 1682; the individual measures taken in application thereof must be rescinded."

---

[*] They include the North Atlantic Treaty Organization (NATO), the Organization for Economic Cooperation and Development (OECD), the Council of Europe (CE), the European Space Agency (ESA), the Western European Union (WEU) and the European Centre for Medium-Range Weather Forecasts (ECMWF).

On 24 November 1999 the Council adopted a resolution in which it agreed, in principle, to fund salary adjustments as recommended in the Coordinating Committee's 40th and 45th reports, with effect from 1 July 1995.

On 10 January 2000 the Chairperson of the Staff Association transmitted to the Director-General the internal appeals that five members or former members of staff, including the complainants, had filed against the Laboratory's failure to execute Judgment 1887. The Director-General formally acknowledged receipt of the appeals on 13 January and proposed awaiting the Council's decision on the execution of Judgment 1887. He specified that the proposal would not prejudice the appellants' rights. He asked the Chairperson to forward his letter to the appellants and provide written confirmation of their acceptance of his proposal. On 14 January the Chairperson replied that the Staff Association Committee had no quarrel with the way he proposed to deal with the internal appeals. However, the complainants, who are not members of the Committee, assert that they were informed neither of the Director-General's letter of 13 January nor of the proposal it contained.

On 21 March the Council adopted a resolution on the execution of Judgment 1887, in which it decided to apply retroactively, for the period from 1 July 1995 to 30 June 1996, the adjustments recommended by the Coordinating Committee in its 40th and 45th reports, plus interest on arrears at the rate of 10 per cent a year as required by Judgment 1682. The following table was included in the resolution:

	40th Report	45th Report	EMBL [adjustment] 1995	Adjustment due
France	1.9 %	- 0.2 %	0.0 %	1.7 %
Germany	2.1 %	0.3 %	0.3 %	2.1 %
United Kingdom	3.5 %	- 0.1 %	0.0 %	3.4 %

In a written statement dated 29 March, the Director-General informed all staff of the Council's decision. He explained that the text of Judgment 1887 would give rise to significantly different interpretations. Two questions arose.

(a) First, should 1995 salaries be adjusted applying the indices recommended by the Coordinating Committee for that year (the option known as "salary adjustment"), or should they be increased to the level of salaries established by the Coordinated Organizations for 1995, which includes 1992-1994 increases not previously implemented in full by the EMBL (the option known as "salary level")? The Director-General observed that the Council was prepared to finance the first option, but that if the second option was adopted, the Laboratory itself would have to find the necessary resources. In the end, the Council chose the "salary adjustment" option.

(b) Secondly, should the increase in 1995 salaries be taken into account in determining the salaries for subsequent years (the so-called "consolidated" option), or should it be applied to 1995 only (the so-called "one-off" option)? The Director-General indicated that the "consolidated" option had been discussed in November 1999, but in Judgments 1912 (*in re* Berthet No. 2 and others) and 1913 (*in re* Dauvergne and others), delivered on 3 February 2000, the Tribunal had dismissed the complaints filed by staff members of the Laboratory challenging their pay slips for 1996 and 1997, and had stated that it had "no reason to conclude that the salary levels decided upon for the [years 1996 and 1997] jeopardise the basic conditions of employment to the preservation of which the complainants are entitled". The Council took those judgments into account and decided that the adjustment for 1995 would be applied only to that year and would not affect the level of remuneration in subsequent years. The Director-General emphasised that the Council's decision had been taken with the sole objective of executing the previous judgments on the "correct legal basis".

On 12 and 25 May the complainants filed internal appeals with the Director-General against the first individual applications of the Council's resolution. For Mrs Glöckner, this consisted of her pay slip for April 2000 and, for the other two complainants, their back pay for the period in question and the adjustment of their termination indemnities. By letters of 17 and 26 May 2000, the impugned decisions, the Director-General and the Administrative Director, who had delegated authority in the absence of the former, respectively rejected their appeals, but authorised them to go directly to the Tribunal.

B. Citing many excerpts from Judgments 1682 and 1887, the complainants contend that, in finding in favour of the complainants, the Tribunal was aware that they were claiming the alignment of the Laboratory's salary scales at 1 July 1995 with those of the Coordinated Organizations. Although they cannot now claim a retroactive salary increase for the period prior to 1995, as they have not challenged the Council decisions for that period, they are nevertheless entitled to a salary adjustment, as from 1 July 1995, that takes into account the adjustments recommended previously. They explain that the recommendations of the Coordinating Committee were based on the salary scales for the previous year, that is those incorporating the adjustments recommended previously. Consequently, if an adjustment recommended by the Coordinating Committee is not applied by the Laboratory, the level of the latter's salaries deviates by larger and larger amounts from those of the Coordinated Organizations, even if subsequent adjustments are granted in full, since they are applied to lower basic salaries. In the complainants' view, the use of the concept of indices rather than actual salary levels is misleading and in breach of Staff Regulation R 4 1.01 in its 1995 version. The resulting erosion in salaries substantially jeopardises the contractual balance between the EMBL and its staff and is therefore in breach of the Tribunal's ruling in Judgment 1913. This methodology does not meet the criteria recalled by the Tribunal in Judgments 1912 and 1913 which are necessary to secure results that are "stable, foreseeable and clearly understood". The complainants emphasise the recognised right of the staff of international organisations, as recalled in Judgment 1912, to receive a level of remuneration equal to that in countries where the salaries are highest.

The complainants contend that the adjustments granted for 1995 must be incorporated in all salary scales established since then. The Council's decision of 21 March 2000 to award the adjustment recommended for

1995 without taking it into account in determining the salary scales for subsequent years, the "one-off" option, is tantamount to reducing the scales at 1 July 1996 by the index applied on 1 July 1995. It therefore amounts to a retroactive decision to make a downward adjustment. That is certainly not what the Tribunal intended in Judgments 1912 and 1913. Furthermore, those judgments cannot interfere with the execution of Judgments 1682 and 1887 by virtue of the authority of *res judicata*. Here again, the retroactive downward adjustment resulting from the Council's decision of 21 March 2000 cannot be considered as achieving results that are "stable, foreseeable and clearly understood". The complainants accuse the Laboratory's Council of acting in bad faith in interpreting the judgments of the Tribunal as it did and in restricting the adjustment of salaries to the period between 1 July 1995 and 30 June 1996.

The complainants have the following claims:

"(i) ... the differences in absolute monthly salary levels for corresponding grades and steps between the original EMBL 1 July 1995 scales (before modification according to EMBL Council's resolutions of 21 March 2000) and those resulting from their alignment with pay levels given in the 45th [Coordinated Organizations] report form the basis for back compensation to the complainants.

(ii) The back pay accumulated on a monthly basis must begin from 1 July 1995 (or the date of employment if later) and proceed to the present for current staff members or to the date of contract termination for former members with a leaving date between 1 July 1995 and the present.

(iii) All pertinent differences in leaving allowances, reinstallation grants, and indemnities at contract termination ... based on salary scales at the time of staff departure must be appropriately compensated according to (i) and (ii) above.

(iv) Pensioners whose incomes are based on the EMBL salary scales as explained in Annex R.E.1 of the EMBL Regulations ... should also be appropriately compensated according to (i) and (ii) above.

(v) Interest at 10% per annum should be given on all sums due from 1 July 1995 to 31 December 1999 and interest at 20% per annum on all sums due from 1 January 2000 to the present.

(vi) All compensatory amounts requested above should be decreased by that already paid according to EMBL Council Resolutions of 21 March 2000.

(vii) All compensation given by the EMBL according to the Council resolution of 21 March 2000 must accordingly be declared insufficient with respect to Judgments 1682 and 1887.

(viii) A sum the Tribunal thinks fit in the circumstances shall be awarded to cover administrative and counsel costs, courier postage and telephone."

C. In its reply the Laboratory recalls that in Judgment 1682, under 3 and 4, the Tribunal explicitly refused to review the decisions taken by the Council prior to 1995 because they were not challenged in time. The EMBL contends that the complainants' claim in the present case, that the Council apply the adjustments recommended prior to 1995, is an attempt to reverse the Tribunal's judgment. The rule against retroactivity, which is based on the principle of legal certainty, requires that decisions which have not been challenged through the proper procedures are final and beyond challenge. Judgment 1682 also found that the Council was not bound to grant all the adjustments recommended by the Coordinated Organizations. Moreover, in Judgment 1329 (*in re* Ball and Borghini), in dismissing the complainants' claims, the Tribunal indicated that to allow previously granted pay adjustments to be challenged "would mean that in a matter as delicate as setting and adjusting staff pay appeal would lie *sine die* against past decisions".

The Laboratory also recalls that the Council has never been under the obligation to align EMBL salary scales with those of the Coordinated Organizations. The decisions of the latter serve only as a guide. The Tribunal's judgments do not oblige the Laboratory to adjust the salaries for 1995 based on all the previous recommendations of the Coordinating Committee. The defendant observes that if the "salary level" option advocated by the complainants were to be adopted, the financial implications for EMBL would be "catastrophic".

With regard to the selection of the "one-off" adjustment option, i.e. the application of salary adjustments for 1995 without follow-on consequences for the level of salaries in subsequent years, the Laboratory recalls that in Judgment 1682 the Tribunal stated that "[t]he decisions taken by the Laboratory each year on pay fully supersede earlier ones". Moreover, in Judgments 1912 and 1913 the Tribunal expressly stated that the salary levels decided upon for 1996 and 1997 did not jeopardise the basic conditions of employment of the staff. In the view of the EMBL, the complainants' claims therefore amount to an attempt to revise those judgments.

D. In their rejoinder the complainants contend that if the adjustments granted for 1995 were not incorporated in the salary scales for 1996, it would be impossible to maintain staff purchasing power which, as recognised in Judgment 1887, under 10, Article R 4 1.01 of the Staff Regulations then in force. The Tribunal also states under 10 that "[i]n cases where a previous adjustment was not high enough to maintain the level yielded by the methodology of the Coordinated Organizations, the staff can claim the shortfall when a new adjustment is made" and that "while the complainants could not seek a retroactive salary increase for a period for which they had not challenged their pay slips, they could do so for the material period 'in keeping with the principles they rely on'". The complainants contend that those principles include the maintenance of purchasing power. Although endeavouring to minimise the importance of that paragraph, the Laboratory has never proposed a different interpretation of it.

The complainants recall that Judgments 1682 and 1887 found that, while the Laboratory was not under an obligation in 1995 to align the salary scales of its staff with those of the Coordinated Organizations, it did have a duty to provide proper reasons for its decision. However, the EMBL has never provided explanations other than financial considerations, which are specifically excluded by those judgments. Accordingly, the complainants say, the financial consequences cited by the Laboratory in its reply may not be relied on to justify the non-alignment of the salary scales. They point out in this connection that in 1995 the external auditors recommended that future budget plans should include outlays for settling possible salary disputes.

According to the complainants, the argument that Judgments 1912 and 1913 justify the downward adjustment in 1996 resulting from the failure to incorporate the 1995 adjustments is in contradiction with the ruling in those judgments, under 18 and 17 respectively, that the possibility of a downward adjustment could be examined only if such an adjustment had occurred, which was not then the case. The complainants submit that the Council's decision is in breach of the principles of equality of treatment, good faith and non-retroactivity.

E. In its surrejoinder the Laboratory reaffirms that Judgments 1682 and 1887 only require it to "apply the decisions for the period in question", or in other words to apply only the adjustments recommended in the 40th and 45th reports of the Coordinating Committee. The terms of Judgment 1887 under 10 do not give the staff a right of appeal *sine die* against salary decisions: that would offend against the principle of legal certainty and Staff Regulation R 4 1.01.

With regard to the rejection of the so-called "consolidated" option, the Laboratory refers to Judgments 1912 and 1913, in which the Tribunal reaffirmed that international civil servants do not have an acquired right to automatic indexing of their salaries. Lastly, the alleged breaches of the principles of equality of treatment, good faith and non-retroactivity have, in the EMBL's view, already been rejected by the Tribunal in the above judgments. If decisions on salary adjustments for subsequent years had been dependent on the implementation of Judgment 1887, the Tribunal would certainly have so indicated, rather than finding that they were in accordance with the principles of international civil service law.

CONSIDERATIONS

1. The complainants are staff members or former staff members of the European Molecular Biology Laboratory (EMBL). They are challenging the first individual applications of a resolution adopted by the EMBL Council on 21 March 2000. The resolution was intended to execute Judgments 1682 (*in re* Argos and others) and 1887 (*in re* Argos No. 3 and others). However, citing breach of *res judicata* and good faith, the complainants appealed, claiming full restoration of their rights or else authorisation to go straight to the Tribunal. By letters of 17 and 26 May 2000, they were informed that their appeals had not been allowed, but that they were authorised to take their case directly to the Tribunal.

2. For a proper understanding of the issues raised by the complainants, it is necessary to go back to the dispute between the EMBL and some of its staff since 1995 and to examine the judgments already delivered by the Tribunal on the matter.

3. In Judgment 1682, delivered on 29 January 1998, ruling on complaints by staff members challenging the level of the salaries that they had received from 1 July 1992 until the end of 1995, the Tribunal dismissed claims against decisions taken prior to 1995. However, it allowed as both receivable and well-founded the claims challenging the decisions not to award salary adjustments for 1995. It found that, in breach of Article R 4 1.01 of the Staff Regulations, in the version then in force, the Laboratory had not paid any heed to the adjustment rates recommended by the Coordinated Organizations, whose decisions should have served as a "guide". The Tribunal sent the complainants back to the EMBL for re-examination of their entitlements to a salary adjustment for 1995.

4. At its session of 2 July 1998, after re-examining the situation, the EMBL Council decided to maintain the adjustments decided upon, which did not take into account the adjustments recommended in the 40th report of the Coordinated Organizations. In Judgment 1887 delivered on 8 July 1999, ruling on two applications for execution, the Tribunal found that the Council's resolution did not satisfactorily execute Judgment 1682 and once again sent the cases back to the EMBL.

5. In Judgments 1912 (*in re* Berthet No. 2 and others) and 1913 (*in re* Dauvergne and others), delivered on 3 February 2000, the Tribunal ruled on complaints challenging the adjustments granted by the EMBL for 1996 and 1997. In dismissing those complaints, the Tribunal found that the EMBL had applied the provisions of Staff Regulation R 4 1.01 and Annex R.A.1 in their new versions, which state that the index calculated according to the procedure of the Coordinated Organizations shall be used as an "orientation". It also found that, while it was regrettable that the Laboratory had not adopted a more precise methodology for adjusting salaries, its application in that instance had neither offended against the principles of international civil service law nor had it jeopardised the basic conditions of employment which the complainants were entitled to have maintained.

6. It was shortly after being informed of those judgments that the Council thought it could adopt a resolution, the one of 21 March 2000,

applying the adjustments recommended in the 40th and 45th reports of the Coordinated Organizations, but limiting its application to salaries for the period between 1 July 1995 and 30 June 1996 and supplementing the amounts due with annual interest of 10 per cent.

7. In challenging the first individual applications of the resolution of 21 March 2000, the complainants contend, first, that the resolution does not satisfactorily execute the Tribunal's ruling for the period between 1 July 1995 and 30 June 1996 and, secondly, that the Laboratory was wrong to confine its decision to the period up to 30 June 1996, without applying its effects to the following two periods. The Laboratory retorts that it did execute Judgments 1682 and 1887 properly and that the complainants' claims for 1996 and 1997 are *res judicata*, having been addressed in Judgments 1912 and 1913.

8. On the first point, the Laboratory is undoubtedly right. Contrary to the complainants contentions, Judgments 1682 and 1887 did not oblige the Laboratory to align the salaries of EMBL staff in 1995 with those of the staff covered by the system of the Coordinated Organizations. As the Tribunal found in Judgment 1682, confirming the precedent in Judgment 1329 (*in re* Ball and Borghini), a line of argument cannot be entertained that would allow appeals to lie *sine die* against past decisions in a matter as delicate as the setting and periodic adjustment of staff pay. The issue on which the Tribunal ruled in Judgment 1682 was not whether, prior to 1995, the EMBL's decisions on pay had taken into account the decisions of the Coordinated Organizations. It merely concerned the lawfulness of the adjustments decided for 1995 in relation to the previous level of salaries. In the end, the recommendations of the 40th and 45th reports of the Coordinated Organizations were endorsed, which is in conformity with the Tribunal's ruling in Judgment 1682, as further developed in Judgment 1887. The Laboratory is right that it did not have to review all the salary scales applicable in 1995 to take into account the earlier decisions of the Coordinated Organizations.

9. Less clear-cut is the issue of whether the benefit of the adjustment granted in the resolution of 21 March 2000 should be limited

to the period between 1 July 1995 and 30 June 1996. Admittedly, that was the only period material to the complainants' claims on which the Tribunal ruled in Judgments 1682 and 1887. But clearly, the salary scales resulting from this adjustment should have served as a basis for subsequent adjustments. However, this was not the case and although the Laboratory paid the staff concerned the amounts that they would have received for the period in question if their salaries had been properly adjusted, it retroactively took as a basis for the new adjustments for 1996 and 1997 the salary scales in force prior to the adjustment made as a result of Judgments 1682 and 1887. It is easy to understand why the Laboratory acted in this way. The decisions taken by the Laboratory's Council were in fact taken on 17 December 1996 for the year 1996 and on 12 December 1997 for the year 1997; at those dates the Tribunal's judgments concerning the adjustments for 1995 had not yet been delivered. But the Laboratory's retroactive reconstitution of the adjustments had the paradoxical effect of limiting the application of the EMBL staff's improved salary scales to a single year, and of reducing their salary levels – if one discounts the subsequent adjustments – after 30 June 1996. The result is an impairment of rights: staff are entitled to expect that any adjustments to their pay will be made on the basis of the salary scales which were established lawfully for the period preceding the adjustment.

10. In rebuttal the Laboratory contends that in Judgments 1912 and 1913 the Tribunal dismissed complaints challenging the adjustments adopted for 1996 and 1997 and that those decisions are *res judicata* and so beyond challenge.

11. The Tribunal recalls in this respect that the judgments dismissing the above complaints carry the authority of *res judicata* only in respect of the matters under dispute, namely the lawfulness of the adjustment rate, not the salary scales. The lawfulness of the measures taken by the EMBL was appraised in the light of the circumstances prevailing when the Council took its decision, and of the complainants' pleas. But the resolution of 21 March 2000 has created a new situation to which the complainants may legitimately react, particularly as in Judgments 1912 and 1913 the Tribunal reserved judgment on any downward adjustments the

EMBL might decide on. Without going into the allegation of bad faith, the Tribunal finds that the Laboratory was bound to give all due effects to a decision it had itself taken to change the salary scales for 1995. Accordingly, and notwithstanding Judgments 1912 and 1913, the complainants are right to claim that the adjustments granted for the period up to 30 June 1996 by the resolution of 21 March 2000 should be maintained beyond that period, and that subsequent adjustments of their pay should be recalculated as from 1 July 1996 on the basis of the amended salary scales that should have been in force at that date in view of the adjustments introduced by the above resolution. The amounts due to the complainants as a result of the adjustments that the Laboratory must make shall bear interest at 8 per cent a year from the due date of each additional amount of salary. The same amounts shall be paid to the complainants and interveners who have left the Laboratory, calculated up to their date of departure and taking into account the measures which must be taken as a result of this judgment for the determination of their allowances, grants and indemnities at the end of their service.

12. Since their complaints succeed in part, the complainants are entitled to costs, which the Tribunal sets at a total of 4,000 euros.

DECISION

For the above reasons,

1. The challenged decisions are set aside.
2. The case is sent back to the Laboratory for new decisions in accordance with 11 above.
3. The Laboratory shall pay the complainants a total of 4,000 euros in costs.
4. Their other claims are dismissed.

In witness of this judgment, adopted on 3 May 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, Mr Jean-François Egli, Judge, Mr Seydou Ba, Judge, Mr James K. Hugessen, Judge, Mrs Flerida Ruth P. Romero, Judge and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

(Signed)

MICHEL GENTOT MELLA CARROLL

JEAN-FRANÇOIS EGLI SEYDOU BA

JAMES K. HUGESSEN FLERIDA RUTH P. ROMERO

HILDEGARD RONDÓN DE SANSÓ

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative

NINETY-FIRST SESSION

***In re* Bartolomei de la Cruz (No. 2)** **Judgment No. 2058**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr Héctor Guido Bartolomei de la Cruz against the International Labour Organization (ILO) on 25 July 2000, the ILO's reply of 27 October 2000, the complainant's rejoinder of 12 February 2001 and the Organization's surrejoinder of 6 April 2001;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case are to be found in Judgment 1972 of 12 July 2000 in which the Tribunal ruled on Mr Bartolomei's first complaint. Following an incident that occurred on 5 November 1998 the complainant, who was Director of the International Labour Standards Department, was temporarily assigned to duties as Special Adviser on International Labour Standards from 14 December 1998.

On 18 October 1999 the newly appointed Director of the Personnel Department sent the complainant four letters. The first informed him that the Director-General invited him to apologise in writing to officials he had wronged by communications he sent in November and December 1998. Moreover, the Director-General said, the complainant was "no longer able to shoulder responsibilities involving the management of a whole team of officials" and so would not be reinstated in his former post as Director of the Standards Department. The other three letters proposed disciplinary sanctions for various lapses in his observance of the standards of conduct required of international civil servants. The complainant sought postponement of disciplinary proceedings on health grounds, which was granted until 31 March 2000. On 17 April he lodged an internal complaint against the decision to relieve him permanently of his duties. Having received no reply he lodged this complaint on 25 July 2000 under Article VII(3), of the Tribunal's Statute.

B. The complainant cites a number of "new facts" and submits testimonies received too late, he says, to be produced in his first complaint. He hopes they will induce the Tribunal to modify its assessment of certain facts and some of its findings in Judgment 1972. In particular, he reverts to problems he had in 1996 and rumours about him prevalent at the time.

He asserts that since December 1998 he has been implicated in two incidents. First, on 23 June 1999 an e-mail message in his name was sent to numerous members of staff. It contained "extremely libellous" comments, in particular about certain senior officials. The then Director of Personnel let doubt linger as to the identity of its author.

Secondly, the September 1999 issue of *Union*, the Staff Union's bulletin, had a brief article about a new remote access software allowing the information technology department at the ILO to connect to a computer and intervene from a remote location. It went on to say that "riffraff" such as "suspended Departmental Directors" would not have access to the software. The complainant recalls that a Staff Union Committee "Flash" of 13 November 1998 had accused him of having "entered" a colleague's computer and not just having "read two e-mail messages". So he protested, but there was no public response from the Administration.

On the strength of a report he commissioned from an expert, the complainant contends that he fell victim to mobbing: he was given no "job specifications for his new functions", he has no responsible chief, the

Administration failed to respond publicly to the "abuse" in the September 1999 issue of *Union* and no serious inquiry was held with a view to punishing the real authors of the e-mail of 23 June 1999.

He alleges several procedural flaws in the administrative investigation of his case, the findings of which were sent to him in May 1999. In particular, the Staff Union Committee filed several letters of grievance against him, one dated 12 November 1998, but he was told neither of their existence nor of their content, and so was unable to adduce cogent arguments in the inquiry. He objects to the inquiry having been entrusted to the then Director of Personnel, whose impartiality he doubts. The Administration should have brought in an impartial outsider. The insulting manner in which the inquiry was conducted as well as its conclusion affirming that the "Flash" was not libellous because it did not mention him by name, show bias against him. The Administration's failure to react to the "Flash" amounts to a refusal to protect his dignity. Even though the inquiry concluded that he had never entered his colleague's computer, the Administration has still not set the record straight in public, so his good name and honour remain seriously impaired.

He further submits that the decision to relieve him permanently of his duties is out of proportion to the charges against him. It overlooked "his past record" in the Organization and was unfounded, since in November and December 1998 his performance was "professional and beyond reproach". Lastly, to ask him to write letters of apology is "more than a humiliation". It amounts to a sanction, and one which is inadmissible because the Staff Regulations make no provision for it.

The complainant asks the Tribunal to order the production of the Staff Union Committee's letter of grievance against him filed on 12 November 1998 and to quash the Director-General's decision of 18 October 1999 in so far as it relieves him permanently of his duties as Director of the Standards Department and invites him to write letters of apology. He also seeks reinstatement in those duties, a published rebuttal of the accusations against him in the "Flash" of 13 November 1998 and compensation for moral injury. He claims costs.

C. In its reply the ILO objects to the receivability of the complainant's claim to the quashing of the invitation to him to write letters of apology, on the grounds that it is not a decision within the meaning of Article VII(1) of the Tribunal's Statute. Moreover, the *res judicata* rule precludes any challenge to the Tribunal's findings and rulings on issues dealt with in Judgment 1972. Accordingly, it says, several of the complaint's paragraphs and annexes must be disregarded. Even if his complaint could in some respects be treated as an application for review, it would be dismissed as irreceivable. Furthermore, being discretionary, the impugned decision is subject to only limited review by the Tribunal. Lastly, it submits that the testimonies and expert report the complainant relies on are of no value as evidence, being based on a partial version of the facts.

As to the e-mail incident of 23 June 1999, the Organization observes that it held a "thorough inquiry" and informed the complainant in a letter of 15 July that it had started investigating the matter. However, since the inquiry failed to reveal the identity of the real author of the e-mail, the Organization was unable to take any action. Regarding the article published in the September 1999 issue of *Union*, the ILO explains that it wrote to the Editor in Chief pointing out that it was reprehensible and calling for compliance with the duty of discretion.

The ILO observes that, having turned to the Director of Personnel several times since November 1998, the complainant is not in a position to object to her having headed the inquiry. He raised no objection when she informed him that the inquiry was to be conducted by the Personnel Department. The Organization denies any bias on the part of the Director of Personnel or the Administration. As to the Staff Union Committee's letter of grievance of 12 November 1998 – which it attaches to its reply – it did send the complainant a copy in October 1999, though the contents were immaterial to the inquiry.

At no time did the ILO cast doubts on the complainant's professional competence. His conduct, however, was another matter: when his lapses came to light the Administration was bound in the Organization's interests to take appropriate action regarding his position in the Organization. The disciplinary sanctions taken show no breach of the principle of proportionality. The latter is in any event immaterial to the decision under challenge, which concerns the assignment of an official and is therefore within the bounds of the Director-General's discretionary authority. The decision as to where the complainant was to be finally assigned would undoubtedly have been different if, after the "Flash" was published, he had not tried to take the law into his own hands without any thought for his fundamental obligations as an international civil servant and the basic rights of other officials in his department. The Organization therefore considers his claims to the quashing of the impugned decision and to reinstatement in his former post to be devoid of merit.

In alleging that the inquiry lacked objectivity, the complainant is raising issues on which the Tribunal has already ruled in Judgment 1972. The ILO observes that it acknowledged the "Flash" to be offensive and that the complainant had the right to defend himself. On the basis of the inquiry report the Staff Union was asked to publish its own corrigendum to the "Flash" and an apology. Otherwise, the Administration was to publish a corrigendum. The Staff Union Committee, however, considered that it was not able to comply with that request. The Director-General takes the view that, since the "Flash" was published nearly two years ago, to revert to the issue now would be counterproductive for the running of the Office. Besides, the Tribunal has in the meantime delivered Judgment 1972 acknowledging that, although the attacks on him were unjustified, the complainant was partly to blame for the deterioration in the working environment that followed. That being so, if the Administration is to publish a rebuttal of the false accusations against him, it must do likewise for the officials he himself accused wrongly. Since he has failed to offer a proper apology, the ILO considers that, in the interests of impartiality, any such publication ought to consist of a referral to the Tribunal's findings in Judgment 1972 and it has proposed to the complainant a draft text to that effect.

In the ILO's view, the only possible affront to the complainant's honour arose from the publication of the "Flash", which the Organization has totally repudiated. It submits that his claims to publication of a corrigendum and to compensation for the injury allegedly caused by the "Flash" are unfounded. Indeed, the two claims cannot be awarded together: although the publication of idle insinuations may warrant compensation, public denial of them constitutes proper redress for any injury caused. The reason why there was no public denial in this case is that the complainant rejected the Administration's proposals. So the absence of a repudiation does not entitle him to any financial relief.

Nor may he claim any compensation on the grounds that the various administrative decisions affecting him caused him moral injury, since there is no conclusive evidence that the ILO caused him unnecessary hardship. When it took the decision to reassign him temporarily, it maintained his grade and showed the utmost discretion in order to protect his good name. If his reputation suffered, he alone is to blame because he has persisted in publicising his own version of the facts. In view of all the foregoing, the ILO considers his allegation of mobbing to be unfounded.

Lastly, the Organization submits that its sole purpose in inviting the complainant to write letters of apology was to enable him to re-establish normal working relations with the officials concerned. It points out that he was not the only recipient of such a request: all the officials concerned by the incidents have been asked to apologise to those they offended.

D. The complainant rejoins that his complaint is not an application for review. He observes that the decision to relieve him permanently of his duties was taken while he was totally unfit for work; consequently, the Administration has had no opportunity to ascertain whether he would again be capable of directing his department. In his submission, that decision constitutes a hidden disciplinary sanction and is unlawful because any lapses he may have had in reaction to the mobbing are largely due to errors on the part of the ILO. Lastly, even an order from the Tribunal to publish a corrigendum to the "Flash" could not undo the two years "of illness and suffering" that he has endured. In this connection, he asks the Tribunal to recognise that his illness is a result of his problems at work.

E. In its surrejoinder the Organization maintains that the inquiry confirmed that there was nothing temporary about the incompatibility of the complainant's "position" with a management post, since he was unable to refrain from "further disrupting the service".

The complainant may not use mental illness as a pretext for blaming the Administration for his mistakes. Besides, for an illness to be service-incurred, it must not only be related to work, but must also be the direct consequence of a specific risk to which the official has been exposed in carrying out duties entrusted to him. Psychological reactions to adverse administrative decisions cannot be attributable to work.

CONSIDERATIONS

1. The complainant is a former Director of the International Labour Standards Department. Following a number of incidents, which are recounted in Judgment 1972 (*in re* Bartolomei de la Cruz), the Director-General relieved him of his duties by a decision, described as provisional, and assigned him to new duties as Special Adviser on International Labour Standards. Construing the reassignment as a hidden disciplinary sanction the complainant came to the Tribunal, which dismissed his complaint in the above-mentioned judgment. The Tribunal found that, in view of the circumstances of the case, the Director-General had lawfully used his discretionary authority in deciding to reassign, at least temporarily, a director whose department was no longer functioning properly, and that the official's dignity had not been impaired.

2. By a letter of 18 October 1999, the new Director of the Personnel Department notified to the complainant the decisions taken to close the case. First, the Director-General had decided to remove him permanently from his duties as Director of the Standards Department on the grounds that all the evidence showed him to be "no longer able to shoulder responsibilities involving the management of a whole team of officials" of a "key department in the area of workers' rights". Secondly, the complainant was invited to apologise in writing to the officials against whom he had made allegations. Lastly "proposals for a reprimand" would be addressed to him under separate cover.

The letter went on to emphasise that the publication of the "Flash" by the Staff Union Committee, which could be construed as accusing a director of improperly entering the e-mail system or computer of another official, could elicit only disapproval from the Administration; that the inquiry which ensued had cleared him of blame on that score; and that the Staff Union would be invited to publish the necessary corrective statements and offer its apologies "if, due to some action or other of its members, a director was associated by name with the accusation in the Flash".

3. On 17 April 2000 the complainant filed an internal complaint under Article 13.2 of the Staff Regulations, recounting the circumstances of the case at length and challenging his "punitive transfer", which, he said, was not a sanction provided for in the rules, was unwarranted and adopted following an inquiry which showed numerous procedural flaws and bias. He also alleged that the Administration failed to protect him from "mobbing", and sought reinstatement in his duties, the publication of a formal denial of the accusations against him in the "Flash" of 13 November 1998, and redress.

4. Since the Director-General failed to reply within sixty days, the complainant has come to the Tribunal challenging the implied confirmation of the decision of 18 October 1999 in so far as it relieves him permanently of his former duties as Director of the Standards Department and invites him to write letters of apology. The complainant adds that he wishes "to obtain changes in some of the assessments ... made by the Administrative Tribunal in Judgment 1972 in the light of new facts and testimonies received too late to be submitted with his first complaint".

5. It should be noted in this connection that the complainant does not challenge the Tribunal's ruling in Judgment 1972, which means that his claims do not amount to an application for review. The ILO contends that assessments already given by the Tribunal are not open to challenge and considers that several paragraphs of the complaint should be discounted under the *res judicata* rule. The plea fails: the decision challenged in the present dispute is not the one addressed in Judgment 1972, so the complainant may rely on all such evidence and testimony as he deems appropriate to support his pleas.

6. That having been said, the ILO is right to object to the receivability of his claim to the quashing of the invitation to him to write letters of apology. Although one of a set of measures devised by the Organization in an attempt to put an end to this regrettable affair, the "invitation" does not constitute, contrary to what the complainant asserts, a decision that can be set aside. If, however, the measure was proved to be excessive, as the complainant contends it is, his claim to compensation for moral injury arising from the affront to his dignity could be justified. This matter will be discussed below under 14.

7. The complainant attributes the decision notified in the letter of 18 October 1999 to remove him permanently from office as Director of the Standards Department to several factors: mobbing, a phenomenon he analyses at length on the basis of a report he commissioned from an expert; hostility on the part of some members of staff; and bias on the part of the then Director of Personnel. In support of his claim to the quashing of that decision, he produces numerous statements from witnesses attesting to his professional competence, which the ILO has in fact never denied.

8. Contrary to the complainant's allegation, the present case adds nothing new to the issues already considered by the Tribunal in Judgment 1972. It is true that he places more emphasis on the fact that the ILO's bias arose from events prior to the incidents that prompted the measures affecting him. He submits for instance that his intention to stand for office as Director-General aroused "false and libellous rumours" in 1996 and that the Administration deliberately prolonged an administrative inquiry into the conditions under which he employed his maid. According to a witness, in the course of that inquiry the former Director of Personnel displayed "inordinate aggressivity" towards him though the accusations against him were false. The Tribunal can clearly not regard allegations about events that occurred in 1996 as proof of the Organization's bias, and will take account only of the objective items of the evidence on file.

9. As well as recounting in detail events with which the Tribunal is already familiar and facts which he qualifies as new – set out under A and B above – the complainant develops the following legal pleas. He alleges that

he fell victim to mobbing and that the ensuing inquiry – the findings of which were sent to him on 24 May 1999 – shows procedural flaws and a lack of objectivity. He further submits that the adverse decision is in breach of the principle of proportionality and without merit.

10. He contends that he was mobbed as a result of the Administration's failure to apply appropriate measures to the Staff Union Committee for publishing a "Flash" that made libellous charges and an accusation of computer piracy which has now been proved false. What is more, he has still not received a "job specification" corresponding to his new duties and does not even have a supervisor. Lastly, the Organization has several times demonstrated its unwillingness to afford him protection: for instance, in June 1999, a libellous e-mail message, of which he was obviously not the author, was sent out in his name.

It appears that the ILO was anxious – though it did not succeed – to keep matters confidential as far as possible and to avoid adding fuel to the accusations, libel and rumours. In the Tribunal's view it would probably have been better advised to state publicly that the e-mails that prompted the dispute were not pirated but simply found in a photocopying machine, as was stated in Judgment 1972. In any event, none of the facts the complainant relies on in this connection bears out his objections to the lawfulness of the decision to remove him from his duties and, more generally, it is plain from the evidence on file that his accusation of harassment on the part of the Organization is unfounded.

11. As to the inquiry itself, it is plain from the abundant correspondence between the complainant and the then Director of Personnel that none of the evidence was kept from him and that he was able to comment on all the Administration's letters and challenge its findings. Even supposing that he did not receive the Staff Union Committee's letter of grievance, the inquiry report notes expressly that no certain conclusions could be drawn because he had been unable to comment on the allegations in it. Moreover, neither the correspondence nor the excerpts of the inquiry report cited in the defendant's reply in any way bear out the serious accusations of partiality and bias levelled against the former Director of

Personnel. Nor is there proof of any procedural flaws, of any impairment of the right of defence, or of any abuse of authority.

12. As to the merits, the Tribunal takes the view that, however regrettable the complainant's position may be for someone able to count on testimonies so laudatory of his competence and the esteem in which he was held, and whose health was probably affected by the dispute, the Director-General exercised his discretionary authority quite lawfully in deciding not to reassign him as head of a department which, as said in Judgment 1972, was no longer able to function properly. That he performed his duties most satisfactorily before being relieved of them is not disputed and is indeed demonstrated by numerous testimonies. However, that affords no grounds for doubting the Director-General's assessment that the complainant was "no longer able to shoulder responsibilities involving the management of a whole team of officials". As noted in Judgment 1972, on several occasions he broke the most elementary rules of confidentiality by making public accusations against a number of colleagues and staff members whom he identified by name, and sending documents concerning the incidents to many people in and outside the Organization – even after the decision to remove him temporarily from his duties had been taken. Consequently, the decision to change what was only a provisional measure into a definitive one cannot be regarded as tainted by any error of law.

13. The complainant asks that the defendant be ordered to publish a denial of the accusations made in the "Flash" of 13 November 1998. It is not, however, for the Tribunal to issue such an injunction.

14. His claim to the quashing of the decision having failed, so too must his claim to redress. It should nonetheless be noted that the ILO did not fail in its duty to protect his dignity and that its invitation to him to write letters of apology, issued in the interests of even-handedness in view of like invitations addressed to the Staff Union, caused him no injury warranting redress.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 27 April 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

(Signed)

MICHEL GENTOT MELLA CARROLL JAMES K. HUGESSEN

CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

NINETY-FIRST SESSION

***In re* Abdur (No. 2), Drechsler (No. 2) and Zeller (No. 2)**
(Application for review)

Judgment No. 2059

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for review of Judgment 1915 filed by Mr Rahim Abdur, Mrs Herta Drechsler and Mr Dietrich Zeller on 3 July 2000, the reply of 12 October from the International Atomic Energy Agency (IAEA), the complainants' rejoinder of 20 December 2000 and the Agency's surrejoinder of 6 April 2001;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS

1. The complainants are staff members in the General Service category at the International Atomic Energy Agency (IAEA). They are seeking review of Judgment 1915 delivered on 3 February 2000 on the grounds that it contains an error of fact likely to affect the original ruling.

2. According to consistent precedent, and contrary to the Agency's assertion, the Tribunal may allow an application for review, but only in

quite exceptional circumstances. As stated in Judgment 1507 (*in re* Morier No. 2), in accordance with Article VI of its Statute, its judgments are "final and without appeal" and carry the authority of *res judicata*. Admissible grounds for review are therefore strictly limited: failure to take account of a material fact, an error of fact which involves no exercise of judgment, omission to rule on a claim, and the discovery of some new facts which the complainant was unable to rely on in the original proceedings. Moreover, the plea must be such as to affect the original ruling (see Judgment 1255, *in re* Bansal No. 4 and Harpalani No. 4, under 2). The grounds which are not admissible for an application for review are an alleged mistake of law, failure to admit evidence, misinterpretation of the facts and omission to comment on a plea (see in particular Judgment 442, *in re* de Villegas No. 4, under 2).

3. By Judgment 1915 the Tribunal dismissed complaints challenging the lawfulness of the Agency's decision to apply to staff in the General Service category the salary scales set for Vienna following a salary survey carried out in Vienna by the International Civil Service Commission (ICSC) in 1996. That survey was conducted pursuant to an earlier decision by the ICSC to phase out the language allowance granted to General Service staff in duty stations where the national language is not one of the Agency's working languages.

4. The complainants submit that the judgment contains a mistake of fact in that it asserts that "compensation for the use of a second language in these jobs (in the form of being placed in a higher occupational group) was fully taken into account".

The Tribunal is satisfied that its decision does not show any error of fact involving no exercise of judgment.

After examining the parties' submissions, the documents produced and in particular the method used in comparing jobs in the common system with those of the "comparator employers", the Tribunal concluded that if jobs covered by a collective agreement were included in the survey in the case of the petroleum industry "compensation for the use of a second language in these jobs ... [had been] fully taken into account".

The complainants observe that after Judgment 1915 was delivered, some of the "comparator employers" indicated that "during the 1996 salary survey conducted by the ICSC, all of the [external] jobs that were compared ... with the ICSC's benchmark jobs and for which salary data were collected were jobs that did not require a knowledge of spoken and written English". But that fact affords no evidence that the Tribunal's finding was mistaken and involved no exercise of judgment.

5. Even if an error of fact was proved – which is not the case – Judgment 1915 is sufficiently justified by other reasons for the Tribunal to affirm that the alleged error had no decisive affect on its ruling. The fact of knowing that, out of the twenty-two "comparator employers", two "major" ones in the petroleum industry, for which there were salary data, did not require a knowledge of written and spoken English for the jobs surveyed, could not decisively affect a decision which found, unlike Judgment 1713 (*in re* Carretta and others), that the main local employers did require their staff to have knowledge of and work in a language other than the local one for no extra pay.

6. The conclusion is that the application for review must be dismissed.

DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment, adopted on 4 May 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour
Administrative Tribunal

Registry's translation, the French text alone being authoritative.

NINETY-FIRST SESSION

***In re* Rumbo**

Judgment No. 2061

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Angel Rumbo against the European Patent Organisation (EPO) on 10 March 2000 and corrected on 10 April, the EPO's reply of 30 June, the complainant's rejoinder of 6 October and the Organisation's surrejoinder of 15 December 2000;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case are set out under A in Judgments 1488 (*in re* Schorsack) and 2024 (*in re* Skelly No. 2) delivered on 1 February 1996 and 31 January 2001 respectively. The work of patent examiners at the European Patent Office, the EPO's secretariat, is rated by a system of points and fractions of points which the Office uses to evaluate an examiner's output. Following staff dissatisfaction with earlier changes in the system, the President of the Office informed staff on 6 November 1997 that under the new points system, which was to come into effect on 1 January 1998, 0.9 points would be awarded for processing a "demand for international preliminary examination" under Chapter II of the Patent Cooperation Treaty ("PCT Chapter II") and 0.4 points (except in special cases) if the demand was subsequently converted into a European patent application ("Euro-PCT").

The complainant, a Spaniard born in 1959, is a patent examiner at grade A3 in the Office's Directorate-General 2 (DG2). By letters of 18 December 1997 he asked the President of the Office to rescind his decision regarding the new points system or else to treat his letters as internal appeals. By a letter of 23 January 1998 the President refused to withdraw his decision. In its opinion of 7 December 1999 the Appeals Committee unanimously recommended rejecting the appeals. By a letter of 13 December 1999, the impugned decision, the Director of Personnel Development informed the complainant of the President's decision to reject the appeals.

B. The complainant asserts that the new points system is not based on objective criteria. Moreover, there is inequality of treatment in that the completion of a file involves more work in some technical fields than in others. In his field for example, it takes as long to process a Euro-PCT application as to process a standard application for a European patent (hereinafter "Euro-direct"), if not longer. He submits that the Appeals Committee has no experience of examining patent applications and based its opinion on considerations which are unfounded. Besides, it was biased: it accepted the Administration's original assumption though it was not backed up by evidence, yet rejected the figures he submitted as evidence. Since the new system took effect the workload has grown but staff have not been given the necessary tools to cope. He assesses the increase in his own workload at 10 per cent.

He asks the Tribunal to quash the new points system and to award him a lump-sum equivalent to 10 per cent of his salary as from 1 January 1998 until the date on which the system is set aside. He also asks that the International Labour Organization (ILO) issue two recommendations to the European Patent Office, one to set up a system that takes account of the real workload involved in processing Euro-PCT files, and the other to change the system for assessing examiners' output. He applies for hearings.

C. In its reply the Organisation points out that the complainant's claims to recommendations by the ILO are irreceivable because they were not made in the internal appeal and are not within the Tribunal's competence. Moreover, he has extended the claims made in his internal appeals: he is asking the Tribunal to quash the new system in its entirety whereas in his internal appeals he challenged only the allocation of points to Euro-PCT applications.

The EPO observes that when the General Advisory Committee, on which the staff is represented, was consulted, no one questioned the Office's assumption that Euro-PCT applications require less work than Euro-direct applications. The Appeals Committee confirmed that the assessment of examiners' work falls within the discretionary authority of the Office management. Moreover, its members are perfectly capable of understanding and assessing the complainant's arguments and figures. The mere fact that they based their opinion on information supplied by the Office is no evidence of bias. The EPO sees no breach of equal treatment in the fact that the new system affects examiners differently, depending on their technical fields. It asserts that examiners do have all the tools they need for their work. If any of them are at a disadvantage, this can always be reflected in their performance reports. The system is thus flexible and at the same time reliable. In the EPO's view, hearings would be superfluous because the complainant had ample opportunity to defend himself in the internal procedure.

D. In his rejoinder the complainant maintains his plea that the Organisation's original assumption was wrong, particularly as regards his own technical field. In support he submits figures to show that the amount of work required to process a Euro-PCT application is in no way determined by the work done in the PCT Chapter II phase, because changes introduced between the two phases make the file substantially different. While not doubting the competence of the members of the Appeals Committee, he maintains that they were biased. In his submission, if unequal treatment is to be avoided, the amount of work examiners in different technical fields have to complete in order to obtain the same number of points should vary only within reasonable limits. The overtime he has to do in order to complete his work is not paid, and contrary to the EPO's assertion, it is impossible for performance reports to take account of disadvantages because ratings are subject to strict numerical rules.

E. In its surrejoinder the defendant argues that the figures supplied by the complainant are not representative and that a general system for measuring productivity must be based on information pertaining to the whole of DG2. It maintains that, though there may be differences between the PCT Chapter II and Euro-PCT procedures, the "patentability criteria" used in the former play a decisive role in the latter. The Administration's conclusion that on average it took less time to process a Euro-PCT application than a Euro-direct application is therefore quite legitimate. Lastly, it denies that ratings obey strict mathematical rules: it is possible to take individual circumstances into consideration.

CONSIDERATIONS

1. The complainant serves the EPO as a patent examiner at Directorate-General 2. He filed internal appeals challenging a decision communicated by the President in a note of 6 November 1997, to take effect from 1 January 1998, to change the system of points allocated to the various tasks to be completed in processing European patent applications.

2. On 7 December 1999 the Appeals Committee recommended rejecting his appeals. It found that the Administration had acted within its discretion in deciding, after consulting the General Advisory Committee, that the number of points awarded would be 0.9 for processing PCT Chapter II applications, 0.4 for Euro-PCT applications and 1.0 for "special cases". It also found the Administration's calculations "to be an indication" that on the whole Euro-PCT applications require less work than Euro-direct applications; and that the complainant's calculations, which were different, failed to disprove the Administration's assessment. It accordingly concluded that he had no grounds for alleging breach of equal treatment or that the Organisation had not provided him with the necessary tools to cope with the larger workload generated by the new weighting system.

3. The President endorsed that opinion and rejected the complainant's appeals. The complainant was so informed by a decision of 13 December 1999, which he is now challenging before the Tribunal. He seeks the quashing of the new points system, payment of a lump-sum equal to 10 per cent of his salary since 1 January 1998, two recommendations from the ILO to put in place a system that takes account of the amount of work actually performed in processing Euro-PCT files and to change the system for assessing the output of EPO examiners. He has also applied for hearings "to clarify in person the information already submitted".

4. The evidence already filed by the parties suffices for a ruling and there is no need to allow the complainant's application for hearings.

5. As to his claims to recommendations by the ILO, the Tribunal observes that it is competent under Article II(5) of its Statute to hear "complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of ... organization[s]" that recognise its jurisdiction, and that it does not have the authority to issue recommendations about an organisation's general policy.

6. This dispute is mainly about the lawfulness of the points system that has been in force at the EPO since 1 January 1998 for the purpose of assessing the productivity of patent examiners.

One of the tasks of the European Patent Office is to process international applications for patents under the Patent Cooperation Treaty and to conduct an international preliminary examination pursuant to Chapter II of the Treaty (PCT Chapter II). If, after the preliminary examination, the applicant decides to pursue the application, the latter can be converted to an application for a European patent (Euro-PCT) which will be examined by the EPO. Under the old assessment system, examiners were awarded one point for processing a standard application for a European patent (Euro-direct); one point for processing an international application involving an international preliminary examination (PCT Chapter II); and one point when the latter was converted into an application for a European patent (Euro-PCT), even if the same examiner had carried out the international preliminary examination. That system having been found unfair, the Organisation tried to change it, first by a note of 26 January 1993 which the Tribunal quashed on grounds of a formal flaw (see Judgment 1488, *in re* Schorsack), and then by a decision of 23 May 1996, which was revoked (see Judgment 2024 *in re* Skelly No. 2). The Organisation then issued the note of 6 November 1997, which is challenged in this complaint on the grounds that it is unlawful.

7. The gist of the complainant's arguments is:

(a) That to process a Euro-PCT application involves as much if not more work than processing a Euro-direct application.

(b) The new points system increased "the pressure of work" because examiners were not provided with adequate tools. Consequently, the only way to obtain the same number of points as formerly was to do overtime equivalent to 10 per cent of the weekly workload of forty hours.

In support of his arguments the complainant submits statistical information on his work from 1993 to 1998, on the basis of which he concludes that:

- "The amount of work devoted to the Euro-PCT processing increased by 8% due to a reduction in the number of direct patent grants of up to 14% in the Euro-Direct phase and to 6% in the Euro-PCT phase."
- "The amount of work involved in the Euro-PCT phase is:
    1.) Totally independent of the amount of work done in the PCT Chapter II phase, and
    2.) Equal to or higher than the amount involved in the Euro-Direct phase."
- "... approximately 16.5% more work is needed to process a Euro-PCT file than to process a standard Euro-Direct case."
- "The changes introduced in the Euro-PCT phase mean that processing a Euro-PCT case involves more work than processing a standard Euro-Direct case because a Euro-PCT file is quite different from the original file submitted at the PCT Chapter II phase."

The complainant concedes that in Euro-PCT cases much of the file has already undergone thorough study at the preliminary examination for the PCT Chapter II application. But, he says, the Administration seems unaware that an application contains dozens of specific technical characteristics; so there is nothing to prevent an applicant, at the Euro-PCT phase, from either altering the invention he claimed under the PCT Chapter II application, by introducing new technical characteristics in framing the claims, or from submitting an altogether new invention. There is no knowing from the examination done at the PCT Chapter II phase what invention will be claimed at the Euro-PCT phase. Consequently, he says, when the technical characteristics are not the ones submitted at the PCT Chapter II stage, the Euro-PCT application takes as long to examine as any Euro-direct application. For example, the entire bibliography has to be analysed again. Lastly, he points out that the work is not at all the same in the Euro-PCT phase as in the previous phase.

8. The EPO reiterates that the members of the General Advisory Committee did not question the Administration's assumption that the old points system was too generous, and that the members of the Appeals Committee, who were perfectly competent EPO officials, concluded unanimously that the arguments and statistics submitted by the complainant were not representative. It adds that the new points system is not in breach of equal treatment and that there are no grounds for accusing the members of the Appeals Committee or the Administration of bias.

9. The Tribunal is aware that any fixed-rate system for weighting the tasks involved in processing complex files may give rise to valid objections. Nor does it doubt the validity of the complainant's statistics on his own work. But it finds no conclusive evidence allowing it to question assessments which were approved unanimously by the members of the Appeals Committee. In an area as technical as patents, the Tribunal will quash an organisation's decision only if it shows blatant misappraisal of facts. The defendant rightly points out that only information pertaining to the whole of DG2 can serve as a basis for a general system for measuring productivity, and its assessment shows no obvious misappraisal of fact. The Tribunal also observes that the provision for a full point to be awarded for "special cases" must be construed as meaning that the system is to be adapted to the amount of work actually required to process Euro-PCT applications. Of course, in order to demonstrate that the allegation of breach of equal treatment is devoid of merit, that provision will have to be applied in practice so that any additional workload borne by certain examiners – or

inherent in certain technical fields – can be offset by recognition of such instances as special cases.

10. Since nothing in the evidence bears out his allegation of bias, the Tribunal can only dismiss the complainant's claims in their entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2001, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

(Signed)

MICHEL GENTOT SEYDOU BA HILDEGARD RONDÓN DE SANSÓ

CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

NINETY-FIRST SESSION

***In re* Kigaraba (No. 7)**

Judgment No. 2062

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Mr Richard Kigaraba against the Universal Postal Union (UPU) on 30 June 2000 and corrected on 21 July, the UPU's reply of 17 October, the complainant's rejoinder of 21 December 2000 and the Union's surrejoinder of 20 March 2001;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant's career at the UPU is recounted in several judgments, including Judgments 1188 and 1366 in which the Tribunal ruled on two of his earlier complaints. Since 1 September 1992 he has held a post as first secretary at grade P.3. On 9 March 1999 he was elected President of the Staff Association.

In response to the Staff Association's wish, the UPU decided in 1996 to reclassify posts at its International Bureau. Posts in the Professional and Senior categories were to be regraded in accordance with the Master Standard of the International Civil Service Commission (ICSC). The exercise was entrusted to an external classifier (Mrs C.). Office notice 31/1999 of 29 April 1999 said that, if a post was assigned a grade higher than that of its incumbent, it would be put up for competition, which meant that the incumbent was not automatically entitled to promotion. The notice also stated the grades attributed to posts: the complainant's was classified as P.3. On 18 June 1999 the complainant applied for review of the grading of his post.

As part of the machinery put in place to deal with such applications, a standing committee for the reclassification of posts in the Professional and Senior categories was formed and a new external classifier, Mrs T., was appointed by mutual agreement between the Director-General and the Staff Association.

Of the twenty-six applications submitted to her for review, Mrs T. confirmed the grades of eighteen posts, and upgraded three posts definitively and five others "prospectively". The complainant's post and three others at grade P.3 were given a "prospective"* P.4 grade.

By a letter of 18 August 1999 the complainant was informed that the classifier had recommended a "prospective" classification of P.4 for his post and that the Director-General had decided that the upgrading would take effect "once the conditions [were] met". On the same day the complainant asked the Director-General to reconsider the decision not to upgrade his post to P.4. On 5 October he asked the Director-General to let him have certain documents pertaining to the classification. He was sent those that concerned him personally under cover of a letter of 12 October. On 29 October he appealed to the Joint Appeals Committee. The latter sought disclosure of the documents that the UPU had declined to send to the complainant. In a letter of 13 December 1999 the Director-General accounted for his refusal to disclose them. In its report of 5 February 2000, the Committee recommended upgrading the complainant's post to P.4 and promoting him accordingly. The report was submitted for consideration by an ad hoc working group and on 24 February the Director-General organised a telephone conference call with Mrs T. in order to clarify the meaning of "prospective classification". The complainant and the Staff Association Committee declined to take part.

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* Office notice 56/1999 of 19 August 1999 stated that prospective classification meant that "upgrading [of the posts in question was] contingent upon the expansion of the duties of the posts involving additional qualifications and responsibilities which will be studied by the group of experts responsible for reviewing the structure and operations of the [International Bureau] early in 2000". (Registry's translation)

The complainant having refused an individual desk audit with the classifier, the Director-General told him in a letter of 14 March 2000 that he had decided to commission a new evaluation of his post. A third classifier, Mrs F., was appointed without the Staff Association having been consulted. On 13 April she graded the complainant's post as P.3. The Director-General wrote to the complainant on 27 April 2000 upholding his decision to maintain the post at grade P.3. That is the impugned decision.

B. Citing comments appended to Mrs T.'s classification, the complainant asserts that he meets the minimum requirements to have his post upgraded to P.4.

He contends that the Director-General's decision to maintain it at P.3 is unlawful and betrays abuse of authority: it is based on a misapplication of the principles and practices of the International Bureau and those of the United Nations common system, and on the unwarranted rejection of the recommendations made by the Joint Appeals Committee and the working group formed by the Director-General himself.

The Director-General misconstrued the notion of "prospective classification". His post was evaluated prospectively for lack of time and the assessment is more an analysis of tasks *performed* than of future attributions required by the restructuring of his post or the International Bureau.

The complainant points out that in the United Nations common system the practice is for the incumbent of the upgraded post to be appointed automatically to the post if he is shown to have given satisfaction. The International Bureau too has done that in practice: the incumbents of all upgraded posts without exception have been promoted.

It is obvious that the Director-General decided to have his post audited a third time merely in order to challenge - unjustly - the reclassification from P.3 to P.4 and cancel the appeals process. Matters were made worse by the "dilatory measures" the Director-General took as soon as he learned that the post had been upgraded to P.4. For example, he twice refused to let the complainant and the Joint Appeals Committee see certain documents, in breach of his right of defence; contrary to consistent practice, the Staff Association was denied the opportunity to examine Mrs T.'s report; and the Director-General formed a working group to consider the Committee's report etc.

Lastly, Mrs F.'s classification of his post was in gross breach of the rules on appeals and those on the reclassification of posts in the Professional and Senior categories and shows several procedural errors and flaws. Furthermore, she drew wrong conclusions from the facts solely in order to invalidate Mrs T.'s classification.

The complainant asks the Tribunal to quash the decision of 27 April 2000, to order the Director-General to upgrade his post to P.4 and to promote him to that grade as from 1 May 1999, the "date on which the decision challenged in this complaint was implemented" and to award him moral damages in an amount of 20,000 Swiss francs. He also claims 10,000 francs in costs.

C. In its reply the Union submits that the impugned decision concerns only the grading of the complainant's post. The complaint is therefore irreceivable insofar as it addresses the complainant's promotion to grade P.4.

Citing the Tribunal's case law it points out that some of the items filed by the complainant as evidence are privileged, a number of them are only drafts and others he obtained by overstepping his authority as President of the Staff Association.

As to his allegation of breach of his right to a hearing, the Union points out that Mrs T. did not prepare a general report – she filled out "point-rating worksheets". Consequently, the complainant may claim production of his own worksheet but not those of other staff members. He is confusing his personal interests with those of the Staff Association in objecting to the fact that the latter was not allowed to see Mrs T.'s report: he has no standing to plead breach of someone else's right to a hearing and besides, only by way of exception was the Association consulted about Mrs C.'s report.

The UPU denies procedural flaws. Authority for decisions about post classification lies with the Director-General and there can be no objection to his seeking an opinion on the options available to him. It points out that the UPU's method of upgrading posts is different from that of the other organisations of the United Nations common system because that method was adopted at the Staff Association's request. Since, unlike the other organisations, the Union had never before based the grading of posts on the Master Standard, it was starting out from a different position from theirs. It observes that the complainant systematically refused, both as a staff member and as President of the Staff Association, to take part in any efforts to clarify the notion of "prospective classification".

It submits that the Director-General's decisions to obtain further information show no abuse of authority because such decisions form part of his attributions.

Lastly, the allegations of a mistake of fact and obviously wrong conclusions drawn from the evidence are without merit.

D. The complainant rejoins that his internal appeal addressed both the post classification and his promotion and that the Joint Appeals Committee found in his favour; the complaint is therefore receivable.

Contrary to the Union's assertion, he says, the case law it cites does hold that any items forming part of the proceedings that led to the impugned decision must be produced.

As to the breach of his right to a hearing, he maintains that Mrs T. wrote a report and that there was nothing confidential about it. The Union's plea that it consulted the Staff Association by way of exception is unsound: Rule 108.1 of the Staff Rules says that the Committee of the Staff Association must be consulted on all matters to do with staff welfare and administration.

As to the other procedural flaws, the complainant submits that, though the Director-General has wide discretion over post classification, that discretion is not limitless because it is subject to review. The fact that it was applying the Master Standard for the first time cannot release the UPU from its obligation to follow the procedure prescribed properly. He maintains that the third classification was unlawful; otherwise, the executive head of an organisation would be free to bring in as many classifiers as he needs until one of them grades the post as he wants.

The complainant points out that as part of the current reorganisation of the International Bureau, the attributions of his post – on which the classification was based – are to be split to make two posts. Consequently, as from 2 April 2001 the post at issue in this complaint will not exist in its present form.

E. In its surrejoinder the UPU submits that, since the complainant's post will no longer exist as from April 2001, his claim to its reclassification at grade P.4 no longer has any substance and is therefore irreceivable.

CONSIDERATIONS

1. The complainant, a Tanzanian citizen born in 1945, joined the Universal Postal Union (UPU) at its headquarters in Bern in 1983 as a second secretary at grade P.2 in the Personnel Section. After being promoted to first secretary at grade P.3, he was transferred at his own request to another P.3 post in a different section as from 1 September 1992. On 9 March 1999 he was elected President of the Staff Association.

Meanwhile, the Union having embarked on a post classification exercise, the Director-General had hired the services of an external classifier to grade posts in the Professional and Senior categories. The Union had never before used the Master Standard of the International Civil Service Commission (ICSC) in regrading those posts.

In accordance with the procedure, a post description and detailed questionnaire signed by their immediate supervisors were supplied by all staff members.

The classifier, Mrs C., drew up a classification of posts in the Professional and Senior categories. Staff were so informed by office notice 31/1999 of 29 April 1999, which said that incumbents of upgraded posts would not be promoted automatically and that the posts would be put up for competition. The complainant's post was graded as P.3. The Director-General approved the classification and the rules to apply it which provided for the possibility of review. A standing committee was set up to consider applications for the review of grades assigned to posts in the Professional and Senior categories. Where they were found receivable, the applications were to be submitted to a new external classifier selected jointly by the Staff Association and the Director-General, authority for decisions on post classification lying with the latter.

Mrs T. was appointed as the new classifier. Of the twenty-six applications for review submitted to her she confirmed the grade attributed in eighteen cases and upgraded the posts in three others. The remaining five were upgraded on a "prospective" basis. These included the complainant's post, which was given a "prospective" classification of P.4. She specified what she meant by the term: an upgrading to P.4 would be contingent on the "extension" of the staff member's duties.

By a letter of 18 August 1999 the complainant was informed of the Director-General's decision to maintain his post at P.3 until the conditions set out in the attachments to the classifier's recommendation were met. On the same day he asked the Director-General to reconsider his decision.

The Director-General asked Mrs T. to state exactly what she meant by "prospective classification". Mrs T. did so, adding that only individual desk audits of the staff members concerned would have enabled her to determine the level of the duties they actually performed.

The matter was referred to the Joint Appeals Committee. In its confidential report the latter recommended allowing the appeal, in other words upgrading the complainant's post and promoting him to grade P.4.

After reading the report, the Director-General made yet another attempt to determine the meaning of "prospective classification". For the purpose he arranged a telephone conference call with Mrs T. on 24 February 2000. The complainant, who had been invited to take part both on a personal basis and as President of the Staff Association, chose not to attend. He was nonetheless informed of the conclusions reached. According to Mrs T., for a prospective classification to become definitive:

(a) the post must involve greater responsibilities and qualifications which justify upgrading it;

(b) the incumbent must assume the increased responsibilities and perform the duties to the supervisors' entire satisfaction in order to be eligible for promotion.

Even so, the post would be put up for competition.

When asked, Mrs T. said that she was unable to complete her evaluation for lack of time and that an individual desk audit with the incumbent was the best way of determining the level of duties.

The Director-General then decided to have Mrs T.'s assessment completed by another classifier. The Staff Association was invited to participate in choosing one, but declined on the grounds that to appoint a third classifier would be contrary to the procedure for the grading of posts in the Professional and Senior categories.

The complainant refused a desk audit with the appointed classifier, Mrs F., who therefore based her assessment on the same documents as her colleagues. She graded the complainant's post as P.3.

The Director-General upheld that grading on 27 April 2000. That is the decision now under challenge.

2. The complainant seeks the quashing of that decision, the upgrading of his post to P.4, promotion to that grade as from 1 May 1999 (when the impugned decision took effect), and awards of 20,000 Swiss francs in moral damages and 10,000 francs in costs.

In support of his claims the complainant has several pleas – procedural flaws, errors of fact and of law, abuse of authority – which are addressed below. In his submission the second evaluation grading his post as P.4 was the right one because it was based on the post description and questionnaire and matched the duties he actually performed. So the Director-General had no reason to order a third assessment and his decision to do so was in breach of the procedure agreed on with the Staff Association. Besides, the third assessment itself was flawed, first and foremost because the classifier undertook a complete review of the post rather than completing the second classifier's assessment.

The Union seeks the dismissal of the complaint, on the grounds that it is partly irreceivable and that the complainant's pleas and charges are devoid of merit.

3. The UPU asks the Tribunal to declare that the complainant's claim to promotion to P.4, on the grounds that his post was upgraded to that level, is irreceivable. It observes that, even supposing it had been upgraded, the post would in any case have been put up for competition. Besides, the impugned decision does not address promotion, so the internal means of redress have not been exhausted.

The complainant retorts that the matter has already been dealt with internally, the Joint Appeals Committee having found in his favour on that score.

The Tribunal need entertain that issue only if the decision to grade the post as P.3 stands.

4. The complainant stated that his post would no longer exist as from 2 April 2001. In its surrejoinder the Union accordingly asked the Tribunal to declare the complaint irreceivable for want of a cause of action.

That claim could succeed if the only issue was the future grading of the post. But that is not the case: the classification for the period ending 1 April 2001 is also at issue since the complainant claims promotion to P.4 with retroactive effect. He is entitled to have that claim considered, at least in terms of its monetary implications.

5. The defendant proposes the removal from the file of certain items of evidence deemed confidential to which the complainant had access as President of the Staff Association and which, the Union alleges, he produced without authorisation in breach of his duties as a staff member.

It submits to the Tribunal certain items it regards as confidential which are not for communication to the complainant.

The Tribunal's practice is to consider any items that are material to the case (see amongst others Judgment 1637, *in re* Fahmy No. 3, under 6).

As to the documents submitted by the Union as confidential, the Tribunal will not use them to the complainant's detriment unless he has had the opportunity to see them beforehand (see Judgment 1815, *in re* Gutiérrez, under 2, and the others cited therein).

6. In any grading exercise the assessment of the type of work performed and the level of responsibility is a value judgment, and only those whose training and experience equip them for the task may make such an assessment. The decision is, in other words, a discretionary one. So it is subject to review only on limited grounds and will not ordinarily be set aside unless it was taken without authority or in breach of a rule of form or of procedure, or was based on an error of fact or of law, or overlooked some essential fact, or was tainted with abuse of authority, or if a clearly mistaken conclusion was drawn from the facts. The Tribunal will not substitute its own assessment or direct that a new one be made unless it is satisfied on the evidence that there is a fatal flaw of that kind (see Judgments 1647, *in re* Bombo N'Djimbi, under 7, 1808, *in re* Mesfin, under 5, and the others cited therein).

7. The parties disagree as to the exact purpose of the grading exercise and the procedure to be followed.

(a) Neither party denies that posts should be graded according to the incumbent's current duties and responsibilities, and they are right on that score.

This accordingly rules out "prospective" classification, which is based on the likely evolution of the post.

(b) However, many of the complainant's objections are based on the assumption that under the grading procedure adopted the classifier is virtually bound to base the evaluations solely on the post description and questionnaire, without completing the information by means of another evaluation or an individual interview.

The UPU assumes the opposite.

The evidence shows that the Union is right. The UPU is part of the United Nations common system. It was using the ICSC's recommendations and Master Standard for the first time. It began by applying that procedure to posts in the General Service category at the end of 1996 and in early 1997. The process is described in office notice 62/1997, paragraph 3 of which states that "information was collected by means of a questionnaire. Where it proved necessary to complete or clarify the information given by the incumbents of the posts, desk audits ... were carried out by the consultant. The expanded Management Committee (together with two representatives of the Staff Association) requested 16 additional desk audits".* In office notice 31/1999 of 29 April 1999, which is about the grading of posts in the Professional and Senior categories, the Director-General explains how the first stage of the evaluation procedure was conducted. A description of every post, written by the incumbent and endorsed by the supervisor, was given to the classifier. The latter "conducted desk audits with the chosen incumbents and their supervisors when she deemed necessary ... In all, 27 desk audits were carried out".* The notice goes on to explain the review procedure. If a request for review is receivable, a new external classifier chosen by agreement between the Director-General and Staff Association carries out a new evaluation "and possibly a 'desk audit'". It is quite plain from these documents – which have not been challenged on this point – that the post description could be supplemented by a desk audit if necessary.

(c) It follows that the second ("prospective") classification of the complainant's post was not consistent with these rules since the classifier did not determine the grade solely on the strength of his current duties and responsibilities. Furthermore, she did not carry out a desk audit – though she thought one was necessary – to determine his duties and responsibilities exactly. It was clearly in the Union's interests that the results of the classification should be applied within a reasonable period of time.

That being so the Director-General did not exceed his discretionary authority by ordering a further evaluation – as allowed by the rules on review – and appointing a new classifier. A desk audit may not have been feasible at the time, and so he did not overstep his authority in ordering a new classification.

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* Registry's translation.

The complainant argues that a desk audit was unnecessary as the post description and questionnaire were evidence enough that what the second classifier described as a "prospective" classification in fact corresponded to his post as it stood. But the plea fails. Experience had already shown that desk audits were often necessary for a precise evaluation, and the Director-General did not abuse his discretionary authority by following the second classifier's opinion on that matter.

8. The complainant pleads breach of his right of defence inasmuch as the Union refused to let him see Mrs T.'s general report. The Union retorts that what she prepared was not a report but individual point rating sheets for each staff member and that they cannot all be disclosed to the complainant. In his rejoinder, however, the complainant acknowledges that the Union did produce the "report" – which is more akin to a letter – in support of its reply.

There is no longer any substance to that objection since the complainant was free to rely on the document as he wished.

9. The complainant objects that there was breach of his right to be heard in that the Staff Association was not given the opportunity to examine Mrs T.'s report.

He has come to the Tribunal in a personal capacity and so lacks *locus standi* to assert the rights of a staff association. He could no doubt plead a procedural flaw if cooperation with the Staff Association was compulsory in this instance and was likely to have a bearing on the outcome of the case.

But there is no evidence that that is so. Paragraph 1 of Staff Rule 108.1, cited by the complainant, provides that the Committee of the Staff Association shall be consulted "on questions relating to staff welfare and administration, including policy on appointments, promotions and terminations" and paragraph 2 provides for "general administrative instructions or directives on questions within the scope of paragraph 1".

The rule allows the authorities some leeway in choosing the issues to be submitted to the Committee. Although the Staff Association was consulted about grading policy, clearly Rule 108.1 did not require it to be consulted again in connection with individual requests for review of initial gradings.

10. The complainant pleads other procedural flaws.

(a) In his submission, after the Joint Appeals Committee recommended allowing the appeal, the Director-General ought not to have sought the opinion of members of a working group formed to write a report. The complainant learned of the document. He contends that the Director-General had no right to seek other opinions.

The Union retorts that the document is privileged. Moreover, it contends that the Director-General is entitled to seek all necessary opinions.

It is right. There was nothing reprehensible in the Director-General's action. The plea fails.

(b) Similarly, the complainant objects to the Director-General's having sought information from the classifier, Mrs T., in order to clarify what she meant by "prospective" classification.

The same observations apply to that plea. The Director-General may gather any information which will enable him to take his decision advisedly. The classifications qualified as "prospective" called for some explanation.

There was no breach of the complainant's right to be heard because he received copies of the correspondence, was invited to take part in the conference call – even if he declined at his own risk – and was informed of the conclusions drawn from it.

The plea fails.

(c) The complainant further contends that the Director-General broke the rules on appeals. He does no more than observe that, according to the rules, the Director-General should have responded to his request before referring it to the Joint Appeals Committee (Rule 111.3), and contests the fact that the review procedure provided for direct appeal to the Committee. However, he claims no injury on that count.

If the point is intended as a plea, it is clearly without merit.

(d) The same applies to his objection that the Director-General tried to relieve the President of the Joint Appeals Committee of her duties. The Committee's proceedings were proper and the complainant claims no injury on that count.

(e) The complainant holds that the grading procedure for posts in the Professional and Senior categories provided for only two evaluations. By ordering a third, the Director-General was in breach of a procedure he had himself set.

As already noted, there was no abuse of authority in the Director-General's finding that Mrs T.'s evaluation was inconsistent with the procedure and virtually unusable as a basis for any reliable assessment of the post as it stood. It follows that the new evaluation he commissioned replaced Mrs T.'s and served as a third opinion. The situation was a new one and the procedure he followed to deal with it was consistent with the intent of the rules he had set.

(f) The complainant further alleges breach of equal treatment and the *res judicata* rule. He sees unequal treatment in the fact that the Administration conferred on itself the right to conduct three evaluations, the last of which disregarded the one by Mrs T. However, he fails to establish that in a comparable or like situation it would have acted otherwise.

He may not invoke *res judicata* for want of a decision by a judicial authority. Nor may he plead breach of the authority of an administrative decision that has not been challenged. Mrs T. was not an administrative authority. Besides, her evaluation was not final and if it showed any shortcomings, they could be addressed in an appeal against the effects of the classification, following a final decision by the Director-General.

(g) The complainant submits that no additional information was necessary because it could be inferred from Mrs T.'s classification that even as it stood his post could be upgraded to P.4.

However, even supposing Mrs T. was right that a desk audit was still needed, the additional information should have been limited to the audit and its result should then have been used to supplement Mrs T.'s evaluation.

It has already been shown above that such an option was all but unfeasible and that the Director-General did not misuse his discretionary authority by ordering a new evaluation. Mrs T. was not in a position to provide further information within a reasonable period given the date at which the new classification was to take effect. Besides, there was no knowing what the new evaluation would bring and the changes it might require vis-à-vis Mrs T.'s.

It is to be noted that the complainant declined all involvement in the procedure to obtain additional information. If as a result the classifier did not receive information which might have been favourable to his case, he alone would be to blame.

11. The complainant sees abuse of authority in the fact that the Director-General did not classify his post as P.4. In his submission by refusing to upgrade it he favoured the organisation unduly to the complainant's detriment.

Abuse of authority may not be presumed (see Judgment 2035, *in re* Boivin No. 5, under 8). It is plain from the foregoing that the Director-General's purpose was to order a classification which was fair and consistent with the rules of the ICSC. There is not one iota of evidence of any abuse of authority.

12. The complainant pleads an error of fact.

The classification itself establishes how prospective classification is to be understood. Points are assigned only to current activities and responsibilities as set out in the post description and questionnaire. It is only logical that the classifier could not assign points to activities or responsibilities not yet defined. Accordingly, the "prospective" classification was meaningless and it was an error of fact not to recognise as much in the impugned decision.

He alleges that the Union was wrong to discount Mrs T.'s conclusions, since in the comments attached to the classification she said that "The final grade determination is based on the Officer's performance of substantive activities such as the revision of consultant reports (more than for format) and the conceptualization of regional projects including their description in project papers for approval by the [Council of Administration]." He maintains that he fulfils these conditions, so the UPU was bound to upgrade his post to P.4.

In support of his allegation of a mistake by the Director-General, he points out that the Joint Appeals Committee and the working group recommended allowing his appeal.

He fails to prove such a mistake. The recommendations were submitted after he filed his internal appeal and at a time when Mrs T. had not yet supplied the necessary clarifications – something she was qualified to do, unlike the Joint Appeals Committee or the members of the working group that the Director-General consulted. Mrs T.'s comments, the correspondence with her and the replies given by telephone show that the prospective grading would be valid only if the incumbent assumed new or extended responsibilities and activities. That was not yet established and an individual desk audit was required for the purpose. The Director-General's decision shows no mistake of fact.

The complainant puts forward virtually the same arguments in support of his allegation that essential facts were overlooked and obviously wrong conclusions drawn from the evidence. Those pleas too must fail.

13. All the pleas being devoid of merit, the complaint must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

NINETY-FIRST SESSION

***In re* Borrelly** **Judgment No. 2063**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Félix Borrelly against the European Patent Organisation (EPO) on 31 May 2000 and corrected on 11 July and the Organisation's reply of 6 October 2000;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a French citizen born in 1937, is a permanent employee of the European Patent Office, the secretariat of the EPO. On 17 July 1997, while on leave in France, he had to undergo an operation for a detached retina in his right eye at the University Hospital Centre in Nice. On 22 July the welfare officer of the hospital requested the Munich Office of the EPO by fax to cover the cost of a period of convalescence from 24 July in a convalescent home in Antibes. The insurance brokers, Van Breda, who are responsible for the day-to-day management of the collective insurance contract concluded by the EPO, refused the request by telephone. In a certificate sent to the Office by fax on 25 July, the doctor treating him at the hospital in Nice certified that the complainant's eye condition "ma[de] a long car journey inadvisable and that he require[d] one month's rest under regular supervision". The same day, after consulting its medical adviser, Van Breda confirmed its refusal in writing to the Office. The complainant was staying with his family in the Nice region, over 80 kilometres from an ophthalmologist's practice which he had to visit regularly. Shortly after his return to Munich, he had to undergo a second operation on his right eye.

By a letter of 15 December 1997, the complainant requested the President of the Office: (1) to ensure that Van Breda takes responsibility for the civil and penal consequences of its action; (2) to examine the "serious shortcomings" in the social coverage of EPO staff; (3) to condemn the practices of Van Breda; and (4) to compensate him for the physical and moral injury caused by the refusal to meet the cost of the care. If his request was rejected, his letter was to be treated as an internal appeal.

After obtaining explanations from Van Breda, the President informed the complainant, by a letter of 9 February 1998, of the grounds cited for the refusal to meet the cost of the care. Van Breda's medical adviser, after consulting an ophthalmologist, had considered that a stay in a convalescent home was not medically essential following an operation of the type undergone by the complainant. Indeed, a mere period of rest under medical supervision had been recommended by the doctor treating the complainant. Nevertheless, the President suggested that the opinion of the Office's medical officer should be sought and asked the complainant to contact the Administration for that purpose.

On 17 April the complainant replied that his internal appeal sought compensation, not explanations for the injury caused him by Van Breda's failure to comply with the terms of the insurance contract. In a letter of 30 April the Director of Personnel Development reminded him of the President's offer to consult the EPO's medical officer and, if he so wished, to challenge the latter's opinion before the Invalidity Committee. Pending a decision on the medical dispute, the Director proposed suspending the internal appeal. The complainant replied on 26 May that the legal issue, namely breach of the collective insurance contract, should be resolved first. Consequently, while agreeing to meet the medical officer, he asked for his appeal to be examined forthwith.

On 6 July 1998 the medical officer confirmed Van Breda's position and, on 8 July, the Director of Personnel Development asked the complainant whether he wished to refer the matter to the Invalidity Committee. On 27 August the complainant challenged the opinion of the medical officer on the grounds that it referred to laser treatment, whereas he had undergone a surgical operation. On 23 September 1998 the medical officer slightly modified her opinion, citing a certificate issued by the complainant's ophthalmologist on 5 December 1997 indicating that he had undergone "a double eye operation with extensive laser treatment".

On 7 October 1999 the Director of Personnel Development again asked the complainant whether he wished to press his appeal or refer the matter to the Invalidity Committee. The complainant replied on 28 October that he was maintaining his appeal. In an opinion dated 15 February 2000 the Appeals Committee, citing the Tribunal's case law, unanimously recommended the rejection of the appeal. By a letter of 8 March 2000, which is the impugned decision, the Principal Director of Personnel informed the complainant that, in accordance with the Appeals Committee's opinion, the President had rejected his appeal.

B. The complainant contends that Van Breda should not have sought a second medical opinion concerning his application for his costs to be met. He says that the relationship between him and Van Breda is governed by a contract which does not envisage a second opinion for a direct transfer after leaving hospital to an establishment that is under medical direction and supervision. The terms of the contract were therefore breached. Moreover, he submits that the case law to which the Appeals Committee referred is not applicable, as the circumstances of the case are different.

In subsidiary pleas he argues that, even if a second medical opinion were authorised, Van Breda should have found out about his state of health before issuing such an opinion. Since it did not, it must be held responsible for the consequences. Lastly, he asserts that, in finding that a stay in a convalescent home was not a medical necessity, Van Breda and the Appeals Committee misinterpreted the medical certificate issued by his doctor. It is customary in France to presume that a transfer request made by a hospital is justified.

The complainant asks the Tribunal to set aside the impugned decision and to award him 60,000 German marks in physical and moral damages, as well as costs.

C. In its reply the EPO contends that the complaint is partly irreceivable, as medical disputes lie within the jurisdiction of the Invalidity Committee, to which the complainant has hitherto constantly refused to refer the case. His only receivable plea concerns Van Breda's right to check the medical necessity of treatment for which reimbursement is requested.

The EPO recalls that the case law allows insurers to check whether treatment is appropriate and/or necessary, so there is no substance to the complainant's argument that the insurance contract contains no express provision to that effect. The evidence produced by the complainant fails to prove the need for a stay in a convalescent home. The original medical certificate recommending one month's rest specified only regular supervision. The EPO denies that Van Breda failed in its duty to find out about the state of the complainant's health: it obtained the opinion of its medical adviser and an ophthalmologist. Moreover, it is not bound by the national practice cited by the complainant.

CONSIDERATIONS

1. The complainant is a patent examiner at the European Patent Office in Munich. While on leave he was hospitalised on 17 July 1997 at the University Hospital Centre in Nice for a detached retina operation on his right eye. In a fax message of 22 July the welfare officer of the hospital requested the Office to meet the costs of admitting the complainant to a convalescent home in Antibes as from 24 July. Van Breda, the insurance brokers responsible for managing the collective insurance contract concluded by the Office under Article 83 of the Service Regulations, rejected the request by telephone on 24 July. The following day, the welfare officer sent the Office a certificate issued by the surgeon who had treated the complainant indicating that his eye condition "ma[de] a long car journey inadvisable and that he require[d] one month's rest under regular supervision". But the same day, citing the opinion of its

medical adviser, Van Breda confirmed in writing its refusal to cover the costs of the complainant's stay in a convalescent home. The complainant says that he had been willing to bear his own costs, but was told that only patients covered by a health insurance scheme could be admitted to such an establishment. He therefore stayed with relatives in the Nice region, which, on several occasions, meant travelling over 80 kilometres for the necessary post-operatory checks. After returning to Munich, he had to undergo a second operation on his right eye on 1 October 1997, his retina having become detached again.

2. In a letter of 15 December 1997 the complainant informed the President of the EPO of the conditions of his convalescence and requested him to ensure that Van Breda assumed civil and penal liability for the serious error he says it committed. He requested the EPO to use all legal means available to it to secure for him compensation for the physical and moral injury he suffered. He added that, if it did not accede to his claims, the Organisation should treat the letter as an internal appeal within the meaning of Articles 106 to 108 of the Service Regulations.

3. Following that request, the EPO referred the matter to Van Breda, which replied on 21 January 1998 that there were no medical grounds for authorising the complainant's admission to a convalescent home; after an operation such as his, it was enough to desist from heavy physical work. The President of the Office informed the complainant on 9 February of Van Breda's reply and offered to seek an opinion on this decision from the EPO's medical officer in Munich. On 30 April, while conceding that the Office was bound to insure its employees against the financial risks of sickness, the Director of Personnel Development informed the complainant that he was entitled to challenge Van Breda's refusal, that a decision would be taken on the basis of an opinion by the EPO's medical officer, and that the latter's opinion could be disputed before the Invalidity Committee. The complainant disagreed with that procedure, deeming that before any medical evaluation it should be determined whether Van Breda was, as he alleged, in breach of the collective insurance contract. He nonetheless agreed to meet the EPO's medical officer. On 6 July 1998 the latter indicated that it was "not

absolutely essential to take specific measures for rest after laser treatment for a detached retina", and concluded that "it [could] not be confirmed that Mr Borrelly's post-operatory stay in a convalescent home was absolutely necessary". That conclusion was slightly modified on 23 September 1998, the complainant having emphasised that he had undergone "a surgical operation and not laser treatment". As a result the complainant requested referral of his appeal to the Appeals Committee.

4. The Appeals Committee issued its opinion on 15 February 2000. It found the appeal receivable, contrary to the Administration's assertion that it should have been referred only to the Invalidity Committee, as it did not challenge the refusal to reimburse the expenses, but sought compensation for the injury caused by the refusal to meet the cost of the stay in a convalescent home. The Appeals Committee, however, considered that the appeal could not be upheld on the merits, since decisions taken on the basis of medical opinions are subject to only limited review; Van Breda's decision not to meet the cost of the complainant's admission to a convalescent home showed no mistake of law or of fact and no procedural flaw. It added that only the Invalidity Committee was competent to decide whether admission to a convalescent home was necessary for his recovery and whether there was a causal link between the alleged mistake by Van Breda and the injury suffered. Endorsing that opinion, the President of the EPO rejected the internal appeal in a decision of 8 March 2000.

5. The complainant has three pleas in support of his complaint against that decision. First, Van Breda lacked authority to review the medical opinion by his surgeon indicating the need for rest. Secondly, the Appeals Committee, whose opinion was endorsed by the President of the EPO, was mistaken in finding that Van Breda's decision not to seek further medical advice and not to request the report on the operation was justified by the urgency of the situation. Lastly, the conclusion that a stay in a convalescent home was not a medical necessity was a misinterpretation of the medical opinion indicating the need for rest.

6. In rebuttal, the EPO argues that the complaint is partly irreceivable as some of the pleas show a disagreement about medical assessments which can only be resolved through consultation of the Invalidity Committee. It is thus receivable only insofar as it challenges Van Breda's right to ascertain the medical necessity of the care for which reimbursement is claimed.

7. The Tribunal shares that view. Article 90 of the Service Regulations, which is relevant to this case, does indeed provide that the Invalidity Committee shall be competent "to decide upon all disputes relating to medical opinions expressed for the purposes of these Service Regulations, on the one hand, by the medical officer designated by the President of the Office and, on the other, by the permanent employee concerned or his medical practitioner". Despite the invitation to do so, the complainant has still not seen fit to refer to the Invalidity Committee the medical issues raised by his appeal.

8. However, as acknowledged by the EPO, the Tribunal is fully competent to consider whether the Office is right in maintaining that Van Breda correctly exercised its authority in rejecting the request to meet the cost of transferring the complainant to a convalescent home. Clearly, the authority of the insurance brokers goes beyond a simple right to make an administrative check of the claims it receives. As the Tribunal held in Judgment 1288 (*in re* Fessel), "the insurers are entitled to information which identifies the nature of the ailment and enables them to determine whether the prescribed treatment is appropriate" and, more generally, have the right to check whether, under the insurance contract, they are liable for the costs of the care dispensed. But they must so exercise that authority as to provide the insured with a guarantee that their claims to coverage are examined with all due care. That was not the case here. Van Breda received a fax from the hospital's welfare officer seeking coverage of the complainant's convalescence in a home following a serious operation. Its only response was to reject the request out of hand by a mere telephone call. It neither inquired further as to the state of his health nor asked to see the report on his operation. And in reply to an inquiry from the EPO after the latter received the certificate from the complainant's doctor prescribing

one month's rest and regular supervision, Van Breda simply referred to the opinion of its medical adviser, without so much as an indication of why it rejected the claim. It would also appear that the complainant's operation was underestimated, since the EPO's medical officer states in her opinion of 6 July 1998 that the complainant simply underwent "laser treatment for a detached retina", so it was not "absolutely necessary" for him to convalesce in an institution. But on 23 September 1998, having re-examined the available documents and the complainant's statements to the effect that he had undergone "emergency cryotherapy", she slightly modified her assessment of the treatment undergone in July 1997. In view of the absence of serious grounds for refusing to cover the cost of the care and the fact that the uncertainty could have been resolved by consulting the surgeon or the report on the operation, the Tribunal finds that the EPO, which is liable for the acts of Van Breda, failed to deal with the matter with all due care and to afford the complainant all the attention he was entitled to expect. It must therefore assume responsibility for an error for which the complainant rightly seeks compensation.

However, in order to assess any physical injury suffered by the complainant, it is necessary to ascertain the later consequences for his health of the refusal to meet the costs of his admission to a convalescent home, and the fact that he did not as a result stay in such a home. These are purely medical matters which, as indicated above, need to be referred to the Invalidity Committee as the EPO proposed.

Nevertheless, the Organisation being at fault, the complainant's claim to redress succeeds in part. Although he cannot at present show any injury from the deterioration in his state of health, he is entitled to an award of moral damages, which the Tribunal sets at 3,000 euros.

9. Since his complaint succeeds in part, he is also entitled to costs, in an amount of 3,000 euros.

DECISION

For the above reasons,

1. The EPO shall pay the complainant 3,000 euros in moral damages.
2. It shall pay him 3,000 euros in costs.
3. His other claims are dismissed.

In witness of this judgment, adopted on 9 May 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

NINETY-FIRST SESSION

***In re* Créchet (No. 6)** **Judgment No. 2064**

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr Patrick Georges Michel Créchet against the European Patent Organisation (EPO) on 24 August 2000, the EPO's reply of 21 December 2000, the complainant's rejoinder of 19 February 2001 and the Organisation's surrejoinder of 9 April 2001;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant's career and facts material to this case are set out under A in Judgments 890, 1667, 1879 and 1910 in which the Tribunal ruled on his five earlier complaints.

The complainant is an examiner at grade A3 in Directorate-General 1 (DG1) of the European Patent Office, the EPO's secretariat, at The Hague. He was seconded as a liaison officer to the Portuguese National Industrial Property Institute in Lisbon from 1 May 1992 to 31 December 1995. As from 1 January 1996 he resumed his duties at DG1 at the same grade, A3.

He was dissatisfied with his performance reports for the periods from 1992-1993 and from 1994-1995 and contested each of them in August 1995 and October 1996 respectively. Following a conciliation procedure, the President of the Office nonetheless endorsed the reports on 27 April 1998. By letters of 28 May the complainant asked him to reconsider that position or else to treat the letters as notices of appeal. In a letter of 9 June 1998 the Director of Personnel Development informed him that the President had decided against reviewing his position and had referred the matter of his reports to the Appeals Committee.

In August 1998 the complainant also challenged his report for the period 1996-1997. Although a conciliation procedure ensued, the President endorsed the report on 15 March 1999. In a letter of 13 July to him the complainant stated that the report did not reflect the work he had done in the last few years. He therefore asked him to reconsider the report or else treat his letter as a notice of appeal. The Director of Personnel Development replied in a letter of 21 July 1999 that the President would not reconsider his position and had referred the matter to the Appeals Committee.

On 5 June 2000 the Committee reported on the three appeals and recommended rejecting them as devoid of merit. By a letter of 21 June 2000, the impugned decision, the Director of Personnel Development informed the complainant of the President's decision to reject the three appeals.

B. The complainant submits that, in spite of giving him a limited assurance that the success of his mission would count in his favour, the EPO had failed to take it into consideration in the three contested staff reports. The first two reports overlooked his "important responsibilities" as a liaison officer and were not endorsed within the time limit set in the general guidelines on reporting attached to communiqué No. 206. What is more, there was breach of process because the "principal reporting officer" signed his report for the period 1994-1995 after the complainant had made his comments.

Explaining that his overall rating was only "good" for 1996-1997 having been "very good" for 1990-1991, he infers that the report for the period 1996-1997 overlooked the positive results obtained during his mission in Portugal and the "significant effort" he made – particularly to increase his output – on returning to DG1. The report does not indicate either how the "guarantees as to the development of [his] career are or will be given effect". When he returned from his secondment the EPO refused to consider whether the experience he acquired as a liaison officer could be put to good use. That, he says, amounts to "*de facto* downgrading".

He asks the Tribunal to set aside the decision of 21 June 2000, to send the case back to the Organisation for a new decision on his three staff reports and to award him 500 euros in costs.

C. In its reply the EPO submits that the case law recognises reporting to be a discretionary matter. The complainant's first two reports were drawn up properly and the reporting officers made a cogent assessment of all the relevant aspects of his work and of his strengths and weaknesses as a liaison officer. The reporting process set in the general guidelines on reporting provides quite logically that the staff member reported on will make comments if he wishes and that the reporting officer will reply to them before the countersigning officer makes his final comment. The EPO observes that the Appeals Committee found that the lengthy adoption procedure did not affect the content of the report for 1992-1993.

It adds that the ratings "very good" and "good" cannot be compared because measurement of productivity in the reporting period 1996-1997 meant comparing the complainant's performance with that of other examiners in the same directorate during the same period. The improvement in his productivity did not necessarily warrant a more favourable rating. The EPO denies any *de facto* downgrading and rebuts the charge that it made no attempt to find him a post where he could put to good use the experience he acquired during his mission: that accusation was prompted by his own misreading of the vacancy notice announcing the post of liaison officer. Though the notice did say that a successful mission would affect the development of the incumbent's career, that did not mean that he could expect a change in duties immediately on return.

D. In his rejoinder the complainant submits that in its reply the EPO disregards the effort he devoted to his duties as liaison officer. He observes that, for the reporting period 1996-1997, he was not in the same position as the other examiners because he had just returned to DG1 after his mission.

E. In its surrejoinder the EPO denies overlooking the complainant's efforts while he was on mission.

CONSIDERATIONS

1. The complainant, an examiner at grade A3 in Directorate-General 1 (DG1) of the European Patent Office, at The Hague, was seconded to Portugal as a liaison officer from 1 May 1992 to 31 December 1995. He then returned to DG1 where he resumed his former duties as an examiner, again at grade A3, as from 1 January 1996.

Relying on assurances he said the EPO gave him, he asked to be promoted to grade A4. His request was refused by a decision of 2 September 1997. In Judgment 1910, of 3 February 2000, the Tribunal quashed that decision and sent the matter back to the EPO for a new one. Before leaving for Portugal, and again during his mission, the complainant had obtained a limited assurance that a successful mission would be treated as an additional point in his favour for the development of his career. The Tribunal found that neither in considering his claim to promotion nor when deciding to reject it did the Office take account of the additional point as it ought to have done.

When the decision of 2 September 1997 was taken the complainant's staff reports had not yet been finalised. Following the delivery of Judgment 1910, the President told the complainant that he would not reconsider the matter of his promotion until the decisions on his staff reports became final.

2. The complainant challenged his staff reports for the years 1992-1993, 1994-1995 and 1996-1997. The gist of his arguments is that the ratings he was given failed to take full account of the quality of his performance, particularly as a liaison officer in Portugal, contrary to the assurance he received before he left.

The first two reports were submitted to a single conciliation procedure, but no agreement was reached. The complainant therefore filed two internal appeals.

As to the third report, he accuses the reporting officers of overlooking both the experience he acquired in Portugal, to the detriment of his career, and the improvement in his productivity as compared to the period 1990-1991, for which he had been rated as "very good". The conciliation procedure again failed to produce an agreement and, the report having been approved by the President of the Office, the complainant appealed against that decision too.

The Appeals Committee joined the three appeals and in its report unanimously recommended rejection. The President endorsed its recommendation and rejected the appeals by a decision of 21 June 2000.

3. The complainant is asking the Tribunal to quash that decision and to send the case back to the EPO for a new decision on his staff reports.

The Organisation seeks dismissal of the complaint as being unfounded.

4. Firm precedent has it that issues raised by staff reports are discretionary and that the Tribunal will set aside or amend a report only if there is a formal or procedural flaw, a mistake of fact or of law, or neglect of some material fact, or misuse of authority, or an obviously wrong inference from the evidence (see for example Judgments 1221 (*in re* Amé de Saint Didier Nos. 1, 2 and 3) under 5, 1394 (*in re* Dietrich) under 5, 1463 (*in re* Weber) under 14, and the others cited therein, and 1688 (*in re* Moran) under 5).

It is for the complainant to provide evidence to show that the decision on his report is challengeable on one of the above grounds.

5. The complainant's first objection is to the amount of time the EPO took to finalise the first two reports: it overstepped the deadline set by the general guidelines on reporting appended to communiqué No. 206 of 14 February 1992. He cites in particular one provision of the guidelines, which says: "If a staff report is not finalised within one year,

all the relevant documents shall be referred immediately to the President for a decision."[*]

It is clear that the EPO did not respect all the time limits, which caused considerable delay. Such delay could *per se* have adverse effects, particularly on the way relatively distant facts are perceived. But performance reports continue to be useful even if deadlines have not been respected. Failure to meet a deadline cannot on its own be a reason for setting aside reports but, depending on the case, the effect that the delay has on the report's content will be taken into account (see Judgment 1394).

In this case the delay can be explained: the complainant had been on mission in Portugal; and he challenged his reports. Furthermore, there is no convincing evidence that the content of the first two reports was affected by the delay in finalising them.

The plea fails.

6. The complainant contends that the conciliation procedure was detrimental to him: the mediator at the first conciliation meeting of 17 December 1996 appeared favourably disposed towards him whereas the mediator at the second meeting wrote an unfavourable report. The EPO points out that it deferred the conciliation meeting at the complainant's request, and because the first mediator was seriously ill, someone else had to be called in.

The complainant does not allege that the Organisation acted maliciously. The procedure had to be resumed, so the second mediator's report is the one that counts. The evidence adduced by the complainant in support of his plea affords no grounds for setting aside the impugned decision.

7. Citing Judgments1667 and 1910 the complainant appears to take the Organisation to task for overlooking the success of his mission in Portugal in his reports.

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[*] Registry's translation.

Those judgments found that, before leaving for Portugal and while he was there the complainant had been given a limited assurance that a successful mission "would be taken into account as a point in his favour" in view of any promotion. In Judgment 1910 the Tribunal stated that it had no reason to suppose that it was taken into account either in establishing his reports or considering his claim to promotion. However, that does not imply that the Tribunal found that it ought to have been taken into account right from the reporting stage.

Although he was given a limited assurance that a successful mission would be taken into consideration, the complainant has no grounds for objecting to the fact that the EPO did not give him higher ratings on that account.

8. The complainant seems to consider that there is a contradiction between a letter from the Principal Director of Patent Information dated 5 October 1995 noting the success of his mission to Portugal, and the content of his staff reports.

The Principal Director countersigned the first two reports, which were not unfavourable to the complainant. Consequently, there is not necessarily a contradiction between the success of his mission to Portugal and certain reservations about his performance expressed by the reporting officers.

The plea fails.

9. The complainant submits that if his performance was unsatisfactory the EPO should have told him so in order that he might improve it.

The EPO rightly retorts that the guidelines provide for no such warning unless the staff member's performance warrants a rating of less than "good", the purpose being to enable him to attain the requisite standard. That was not the complainant's case.

10. According to the complainant, the "principal reporting officer" lacks authority to countersign a report after the staff member concerned has commented.

The argument is unsound since part IX of the general guidelines allows for final comments by the reporting officer and countersigning officer.

11. As to the reporting period 1996-1997, the complainant points out that the overall assessment of his duties as an examiner went from "very good" in 1991 to "good" despite an improvement in his performance (his output increased by 50 per cent) and an additional effort (because he had done a different job for nearly four years in Portugal). He submits that the reporting officers should also have taken into account the success of his mission, in accordance with the assurance given him before he left.

The Organisation retorts that his arguments are immaterial. It contends that his output should be compared with that of other officials for the same period, 1996-1997, and not his own output for 1990-1991. Working methods had changed since then, and 1990-1991 is not an appropriate period for comparison because a review of the marking system known as the "stamp operation" (see Judgment 1264, *in re* Herbelet) was carried out at the time.

In rebuttal the complainant argues that to compare his output with that of other colleagues was inappropriate since, unlike him, they had not had a four-year interruption of their careers as examiners. The use of new computer tools could explain a slight improvement in productivity, but not an increase of 50 per cent.

The Tribunal points out that, the choice of terms of comparison and ratings given in performance appraisals being discretionary, the offending reports show no flaws that warrant setting them aside.

It is nonetheless worth noting that reports could be based solely on objective results and ignore the staff member's efforts. But in the interests of equal treatment any difference in the position of officials compared warrants recognition. It could be reflected in some other manner, however, and not necessarily in staff reports. In this case, having been sent on mission to Portugal in the Organisation's interests, it took the complainant some time to readapt and bring his performance back onto a par with that of his colleagues, with the result that he was given a lower rating. It would be unfair to penalise him on that account; however, that issue may be considered later and taken into account whenever a decision is made about his promotion.

12. The following points should be noted:

(a) the Organisation overlooked the success of the complainant's mission in Portugal and, consequently, account was not taken of the limited assurance given to him;

(b) the Organisation does not deny the "positive results of the complainant's mission in Portugal". Indeed, it recognised them in a letter of 5 October 1995 addressed to the complainant by the Principal Director of Patent Information, even if it had a number of reservations.

As Judgment 1910 held, it is in taking a decision about his promotion that the appointing authority must consider the scope of the limited assurance given by the Office. Although the President has broad discretion in determining how successful the mission was and in comparing the complainant's position with that of officials who stayed in The Hague, he must not overlook the fact that the success of the mission is an additional point in the complainant's favour, and the assurance, albeit limited, that he was given must not remain a dead letter. Even if he is not to benefit from promotion immediately, the Organisation's duty of consideration towards him requires it to inform him in what conditions he might expect a promotion to be awarded.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI HILDEGARD RONDÓN DE SANSÓ

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

NINETY-FIRST SESSION

***In re* Créchet (No. 7)**
(Application for execution)

Judgment No. 2065

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for execution of Judgment 1910 filed by Mr Patrick Georges Michel Créchet on 11 October 2000, the reply submitted by the European Patent Organisation (EPO) on 21 December 2000, the complainant's rejoinder of 19 February 2001 and the Organisation's surrejoinder of 18 April 2001;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant is an examiner at grade A3 in Directorate-General 1 (DG1) of the European Patent Office, the EPO's secretariat, at The Hague. He was seconded to Lisbon as a liaison officer with the Portuguese National Industrial Property Institute from 1 May 1992 to 31 December 1995. As from 1 January 1996 he resumed his former duties as examiner at DG1 and at the same grade, A3.

In Judgment 1667 (*in re* Créchet No. 2) the Tribunal stated that a successful mission as liaison officer would "be taken into account as a point in his favour whenever a decision was to be taken on promotion".

By a letter of 27 August 1998 the complainant was informed that the President of the Office had decided to reject his internal appeal against the refusal to promote him to grade A4. In Judgment 1910 of 3 February 2000 the Tribunal ruled on Mr Créchet's fifth complaint, which challenged the decision in that letter. It found that in taking its decision about the complainant's promotion, the EPO had overlooked the matter of successful work as a liaison officer over and above the general criteria for promotion; and that in so doing it had deprived its refusal of a legal basis. Being unable to substitute its own assessment for that of the Organisation, the Tribunal quashed the rejection of the internal appeal and sent the case back to the EPO for the President to take a new decision about the complainant's promotion.

By a letter of 2 March 2000 the President told the complainant that he had taken note of Judgment 1910 and with a view to its execution had asked the Chairman of the Promotion Board to reconsider his case in the light of the Tribunal's reasoning. He further informed him, in a letter of 31 August 2000, that the Board had decided to defer its opinion because all his staff reports since 1992 were *sub judice* and it was unable to recommend his promotion to grade A4 on the basis of reports that had not been finalised. The President added that once they were finalised he would consult the Board again. That is the impugned decision.

B. The complainant submits that by deciding to postpone its decision on his promotion for the reasons cited in the letter of 31 August 2000, the President disregarded Judgment 1910. Furthermore, that letter mentions neither the "special guarantees" that went with his mission to Portugal, nor the "level of his performance" as a liaison officer.

He asks the Tribunal to quash the impugned decision and send the case back to the EPO for a new decision on his promotion in accordance with Judgment 1910 and to award him 500 euros in costs.

C. In its reply the EPO explains that the complainant's reports were finalised after the President's decision of 21 June 2000 to reject his internal appeals. The Promotion Board did reconsider his case on 4 December but concluded that it was unable to recommend promoting him to A4 and the Chairman so announced in a note of 11 December 2000.

The Organisation contends that the complaint is devoid of merit and shows no cause of action. In Judgment 1910 the Tribunal ruled that the complainant's mission to Portugal should be taken into account in his reports; the Promotion Board's recommendation and the President's decision could therefore be legitimately deferred until the internal procedure was over, the reports on the complainant's performance as liaison officer being *sub judice*. Consequently, whatever the recommendation and decision might say, it did execute Judgment 1910 ordering the case to be sent back to the Organisation for a new decision as to the complainant's promotion to grade A4.

D. In his rejoinder the complainant submits that further consultation of the Promotion Board does not amount on its own to execution of Judgment 1910. In reconsidering the case the EPO did not establish the "share to be attributed to success in [his] liaison work" in the context of its overall evaluation. He adds that at the time of filing his rejoinder he had still received no final decision from the President regarding his promotion.

E. In its surrejoinder the EPO points out that the complainant was told of the President's decision by a letter of 11 April 2001. Endorsing the Board's recommendation, the President decided to disallow the complainant's claim on the grounds that liaison work did not justify his promotion.

CONSIDERATIONS

1. The complainant's career and the facts that prompted this dispute are set out in Judgment 1910 (*in re* Créchet No. 5) delivered on 3 February 2000. In that case the complainant challenged the decision to refuse him promotion to grade A4.

In the above-mentioned judgment the Tribunal found that the complainant, who had been seconded to Portugal as a liaison officer from 1 May 1992 to 31 December 1995, had been given limited assurance that a successful mission would be taken into consideration for the advancement of his career. But the EPO failed to take account of the mission as an extra point in his favour either in reporting on his performance or in coming to a decision about his promotion. The Tribunal therefore sent the case back to the Organisation.

2. On 2 March 2000 the President of the Office informed the complainant that he had asked the Promotion Board to reconsider his case in the light of that judgment and to give him an opinion. In a letter of 8 August 2000 the complainant told the President that, in his view, the judgment had still not been executed. The President replied in a letter of 31 August 2000 that the Promotion Board had decided to postpone a decision until the complainant's staff reports – which were sub judice – had become final. He concluded his letter with the statement: "As soon as the reports still outstanding have been finalised, I will seek a new opinion from the Promotion Board."

In his sixth complaint, on which the Tribunal has also ruled this day, the complainant challenges his staff reports for the periods 1992-1993, 1994-1995 and 1996-1997.

3. In this application for execution the complainant is asking the Tribunal to quash the decision of 31 August 2000 and send the case back to the Organisation for a decision on his promotion in accordance with Judgment 1910. In his submission the judgment has not been executed because the decision as to his promotion has been deferred.

The Organisation claims dismissal of the application. Since the decision about his promotion was to be taken on the basis of his reports and was to take into account his mission in Portugal as an extra point in his favour, the EPO deems that it was right to wait for the reports to be finalised before deciding. Though in its reply it does not claim that the

President has already ruled on the promotion, it contends that it did execute Judgment 1910 and that this application therefore lacks a cause of action.

In its surrejoinder, however, it states that it submitted the reports for the period 1992-1997 to the Promotion Board on 4 December 2000, that the latter issued an unfavourable opinion and the President therefore rejected the complainant's claim on 11 April 2001.

4. In this application the complainant is challenging the decision of 31 August 2000 to defer any decision about promotion pending settlement of the appeals against his reports for the period 1992-1997. However, the President's new decision of 11 April 2001, which is not part of the present procedure, has deprived the application of a cause of action.

5. Since he claims costs, it must be determined whether the complainant did have a cause of action at the time of filing this application on 11 October 2000. At that date, the execution of Judgment 1910 had not been completed, the reports having been reconsidered by the Board on 4 December 2000.

When the Tribunal sends a case back to an organisation for a new decision, what constitutes proper execution of its judgment – including the appropriate time scale – will depend on the circumstances of the case and particularly the measures prerequisite to a new decision.

In the judgments on his earlier complaints the Tribunal ruled that the decision about the complainant's promotion was to be based on the quality of his performance – as reflected in his reports – and on the success of his mission in Portugal. The complainant having appealed against his three reports it appeared advisable to await the outcome of those appeals before taking a decision on his promotion. Otherwise, the Organisation would have run the risk of having to amend its decision later. Postponement of the decision also appeared to be in the complainant's interests since he had challenged the ratings in his staff reports. In any event, the matter was not urgent since a promotion could have been granted retroactively.

The Tribunal therefore finds no fault with the decision of 31 August 2000.

Consequently, the complainant's claim to costs cannot succeed.

DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment, adopted on 9 May 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI HILDEGARD RONDÓN DE SANSÓ

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

NINETY-FIRST SESSION

***In re* Tekouk** **Judgment No. 2066**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Mohamed-Larbi Tekouk against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 17 November 2000, UNESCO's reply of 21 December 2000, the complainant's rejoinder of 31 January 2001 and the Organization's surrejoinder of 13 March 2001;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Algerian who was born in 1938, is a former employee of UNESCO. He joined the Organization in October 1973 on a temporary appointment as a messenger at G.1 at UNESCO's headquarters in Paris. In March 1974 he was given a fixed-term contract and assigned to another post at the same grade. He was promoted to G.3 in July 1977 and then to G.4 in January 1981. He was awarded an indeterminate appointment on 1 April 1984.

In response to his wish to move closer to his family, then resident in Peru, UNESCO transferred him to Caracas (Venezuela) and promoted him from 4 September 1989 to grade P.1, step 3, as an assistant programme specialist for the promotion of publications. The corresponding "notice of personnel action" bears the date 17 August 1989. Citing a "serious reduction" in pay as a result of his transfer, the complainant wrote on 30 October to the chief administrative officer for personnel serving in the field asking to benefit under a circular allowing officials transferred away from headquarters to be awarded three additional within-grade steps. The chief administrative officer rejected that request in a memorandum of 4 December 1989 on the grounds that the complainant had been promoted to grade P.1. He was promoted to P.2 on 1 September 1991 and in September 1997 resumed service at headquarters.

In a letter of 9 January 1998 the complainant explained to the Director-General that, at the time of his transfer to Caracas he had accepted the grade and step attributed to him because what mattered most was to move closer to his family. However, he now realised the serious consequences of his grade for his salary and pension. He therefore asked the Director-General to restore his rights with regard to salary and pension entitlements as from the date of his transfer and to promote him to grade P.3 with retroactive effect. In a memorandum of 10 March the Director of the Bureau of Personnel informed him that the Director-General rejected his requests.

The complainant wrote to the Director-General on 4 April; he sought an end-of-career promotion to grade P.3 and wanted his career reconstituted as from the date of his transfer to Caracas, when, he says, the Organization ought to have promoted him to grade P.2, step 6. The Director of Personnel wrote to him on 15 July confirming on the Director-General's behalf that the grade and step assigned to him on transfer were the right ones. On 23 July the Director-General had a talk with him. By a memorandum of 9 September the Assistant Director-General for Management and Administration asked the Director of Personnel and Director of the Office of International Standards and Legal Affairs to prepare a recommendation for the Director-General in order to settle the dispute once and for all. By a letter of 9 November 1998 the complainant asked the Director-General what he had decided as a result of their talk. In a letter of 5 January 1999 the Director of Personnel replied that the Director-General upheld the rejection of his claim to the reconstitution of his career and that he should regard that decision as final.

On 3 February the complainant wrote a letter of protest to the Director-General asking him to reconsider his decision of 5 January and to sort his position out. By a memorandum of 16 April 1996 the Director of Personnel told him that the Director-General "yet again" upheld his decision of 10 March 1998. On 4 June 1999 the complainant sent a notice of appeal to the secretariat of the Appeals Board. The Board reported on 29 June 2000. It stated that it would not entertain the merits of the case since the appeal was time-barred. It did find, however, that the Organization might have assigned the complainant the wrong grade and step in 1989 and, to clear up any doubts, recommended that the Director-General have a report written on the matter and then take a final decision. By a letter of 28 August 2000, the impugned decision, the Director-General rejected the complainant's appeal.

In the meantime, in a letter of 8 October 1999 the Director-General informed the complainant, who had been in retirement since 31 May 1998, of his decision to grant him an end-of-career promotion to grade P.3 backdated to six months before the date of his retirement.

B. The complainant contends that a promotion ought to involve an increase at least equivalent to one within-grade increment. His transfer to Caracas incurred an annual loss in salary of 7,170 United States dollars whereas had he been promoted to P.2, step 6, the level of his pay would at least have been maintained. He further submits that the decision to transfer him at P.1, step 3, was arbitrary and disregarded the practice in similar cases. To illustrate his point he observes that Mr V. – who, like himself, had held grade G.4 step 9 at the time of his transfer to Latin America – had been promoted to P.2, step 11. Furthermore, Mr Z., another colleague who was, he says, in a position similar to his, had sought a review of his salary and been granted a lump sum in damages in 1991. Lastly, he points out that at 9 September 1998 the Director-General had still not taken a decision about him. That, in his view, is clear proof of "discriminatory measures" and "dilatory measures" on the part of the Organization.

He asks the Tribunal to acknowledge that UNESCO took "dilatory and arbitrary measures" against him, to quash the decision of 28 August 2000 and to order that his career be reconstituted as from the date of his transfer to Caracas, on the basis of grade P.2, step 6.

C. In its reply the defendant objects to the receivability of the complaint on two counts. First, the complainant exceeded the statutory time limits for challenging the decision of 30 June 1989 to set his grade as P.1, step 3: his request of 9 January 1998 for reconsideration was time-barred. Secondly, that same request was rejected on 10 March 1998 and the complainant's letter of protest of 3 February 1999 was also time-barred. Furthermore, it challenged the decision of 5 January 1999 which merely confirmed the one of 10 March 1998 and so could not set off a new time limit.

In subsidiary pleas on the merits the Organization argues that the Director-General's decision setting the complainant's grade at the time of his transfer was lawful. He took it on the basis of a proper assessment of the facts, within the bounds of his prerogatives and in accordance with the applicable rules and regulations. Until 1989 UNESCO took the post adjustment multiplier applicable at the relevant duty station as the basis for calculation, but that method had given rise to blatant disparities in the grades and steps established for General Service staff promoted to the Professional category and assigned away from headquarters. The method was therefore changed in 1989: henceforth, the scales corresponding to a single duty station, Paris in this case, were to be applied before such staff members were transferred from headquarters to the field. The new methodology having been applied consistently since that date, the principle of equal treatment has been observed. Lastly, UNESCO explains that a lump sum was paid to Mr Z. as redress for an error of reckoning linked to the multiplier.

D. In his rejoinder the complainant observes that in his letter of 30 October 1989 he asked the Director-General to "render [him] justice", so he did challenge in time the decision to transfer him of 4 September 1989 – that being the date on which the notice of personnel action of 17 August 1989 "took effect". He again observes that at 9 September 1998 the Director-General had still not taken a final decision about him, so he was not in a position to appeal. He further observes that UNESCO failed to answer his plea that he was not treated on a par with Mr V., and adds that his salary in 1989 was based on a miscalculation linked to the choice of multiplier.

E. In its surrejoinder UNESCO asserts that, even if the complainant's letter of 30 October 1989 was a written protest, the complaint would nonetheless be irreceivable for failure to comply with the procedural rules. Furthermore, he may not cite the memorandum of 9 September 1998 to explain the lateness of his protest because it contains no challengeable decision and was not addressed to him. UNESCO explains that it did not mention Mr V.'s case in its reply because his position was quite different from that of the complainant. Lastly, the complainant has misread the Administration's calculations of 1989, which were indeed based on the multiplier for Paris.

CONSIDERATIONS

1. In September 1989 the complainant, who at the time was employed by UNESCO, was transferred from headquarters in Paris to Caracas at his request and had accepted the terms of the transfer. After resuming his duties at headquarters as from September 1997 he asked the Director-General to pay him, with retroactive effect for the period he spent in Venezuela, the equivalent either of the salary he would have earned had he stayed in Paris or of the salary paid to colleagues in like case. The Director-General rejected his request. He filed an internal appeal, but the Director-General upheld the rejection of his claim. That is the decision he is now impugning.

He seeks the quashing of the Director-General's decision of 28 August 2000 rejecting his appeal, and wants his career reconstituted as from the date of his transfer to Caracas, on the basis of grade P.2, step 6.

UNESCO seeks the dismissal of the complaint as irreceivable.

The application for hearings

2. The complainant asks the Tribunal to hear as a witness Mr B., former Director of the Office of Statistics and a former mediator at UNESCO, for the purpose of establishing that the Administration "refused to recognise its miscalculation of the complainant's salary at the time of his promotion and to compensate him for the injuries sustained".

Such a hearing would serve no purpose because the issues it would address are immaterial to the settlement of the dispute. Since it is not alleged that the complainant's salary was set on the basis of an oral agreement or oral statements, the written evidence will suffice to determine any amount to be awarded to the complainant and to establish whether there was any mistake on the part of UNESCO. The application for the hearing of a witness is therefore disallowed.

Receivability

3. The basis of the complainant's transfer to Caracas with a promotion from grade G.4 step 9 to P.1 step 3 is a notice of personnel action dated 17 August 1989 and taking effect from 4 September 1989.

On 30 October 1989 the complainant asked to benefit from a circular under which staff members transferred away from headquarters were eligible for the grant of three additional within-grade steps. His application was refused.

On 9 January 1998 he asked the Director-General to reconsider his decision of 17 August 1989 and claimed among other things the restoration of his rights with regard to salary and pension entitlements as from the date of his transfer, and promotion to P.3 with retroactive effect. By a letter of 10 March 1998 the Director of the Bureau of Personnel informed him that the Director-General rejected his claims. From subsequent correspondence and an interview the complainant was able to infer that the Administration's position as set out in the letter of 10 March was not necessarily final. Not until 5 January 1999 did the Director of Personnel inform him that the Director-General rejected his claims and that he was to treat that decision as final.

4. The decision of 17 August 1989 was not impugned in time. It has therefore become final and is now beyond challenge.

The same applies to the later decisions changing the complainant's administrative position, since he failed to challenge them in time.

5. Good faith requires that a time limit shall not start to run until an organisation has taken a final decision deemed to affect a staff member adversely (see among others Judgment 1694, *in re* Benaissa, in which the Tribunal found that the complainant "suffers no injury from having to wait for a challengeable decision"). As to the decision of 5 January 1999, precedent has it that when an organisation hints that it will reconsider a decision affecting a staff member, it cannot reasonably expect the latter to challenge that decision. Nor may the staff member lodge an appeal against it unless the Administration expressly states that the appeal procedure will take its course despite attempts to settle the case. In such instances, the rule that confirmation of an earlier decision sets off no new time limit for appeal does not apply.

The conclusion is that the complainant exercised his right of appeal within the time limit set off by the Director-General's final refusal. There is therefore no substance to the Organization's plea that the complaint was time-barred.

The merits

6. The complainant observes that at the beginning of his assignment to Caracas his yearly pay at grade P.1, step 3, was 7,170 United States dollars less than the amount he would have received in Paris at grade G.4, step 9. To earn the equivalent, he would have had to be promoted to P.2, step 6. He explains that, having accepted the assignment abroad and the terms of the transfer, he later realised that he was earning less than was customary and less than colleagues in a similar position, i.e. officials in the General Service category transferred away from headquarters with a promotion to the Professional category.

The Organization argues that the complainant's salary was calculated according to the rules in force, and that he accepted it. Until 1989 the calculation was based on the post adjustment multiplier of the relevant country, but the results varied greatly from one case to another. UNESCO therefore amended the methodology in 1989. Since then, it has used the scales in force for a single duty station, Paris in this case, before transferring General Service officials away from headquarters with a promotion to the Professional category. That was the methodology it applied to work out the complainant's salary in Venezuela and has applied consistently ever since. Consequently, the complainant may not plead breach of equal treatment: the colleagues he refers to had their pay set according to the old methodology.

7. The rule in force at the time, namely Rule 104.13(b)(ii) of the Staff Rules, said:

> "Promotion from General Service to Professional category
>
> A staff member shall, upon promotion, be placed in the first step of the new grade, where such a promotion produces an increase in the total of annual net salary and post adjustment at the without-dependant rate of not less than one full increment in the new annual net salary scale over his previous pay ..."

The complainant does not show – or even allege – in his complaint that UNESCO broke that rule. On the contrary, he asserts that there was no specific rule.

In his rejoinder, however, he contends that in reckoning his salary the Organization did not apply the new methodology but used a multiplier of 17, applicable to Caracas, instead of 55, which was the multiplier for Paris. In rebuttal the Organization refers to the document used to work out the complainant's salary and a circular in force at the time, to show that, contrary to the complainant's assertion, it applied a multiplier of 53.8 – in other words the multiplier for Paris.

The figures in the notice of personnel action do not match those in the document used as a basis for reckoning his initial salary in Venezuela, so the Tribunal is unable to ascertain whether his new status brought him an increase or a reduction in salary. In any event, it did bring him important benefits (a duty station closer to his family, as he wished, and a promotion from the General Service to the Professional category), and he accepted that status. In the circumstances, the Tribunal fails to see anything unlawful or any breach of the Staff Rules and Regulations in that new status.

8. The complainant's main plea in support of his claims is that colleagues in the General Service category transferred away from headquarters with a promotion to the Professional category were given a higher grade than he. Citing his right to equal treatment, he seeks the same benefit with retroactive effect.

The defendant has explained in detail that the examples cited by the complainant all concern officials who were transferred before the methodology was revised in 1989. Since the complainant has not denied that assertion, it can be taken as established. UNESCO indicated that one official who was transferred under the old methodology had obtained retroactive application of the new methodology and hence an award of a lump sum in damages.

There is breach of equal treatment only where staff members in an identical or comparable position in fact and in law receive different treatment from the organisation. Consequently, the right to equal treatment does not preclude amendment of a rule or the way in which it is applied. A new rule could be less favourable than the old one, and hence be subject to challenge, without necessarily impairing the right to equal treatment.

Since he has failed to prove that the new methodology was unlawful, the complainant may not cite unequal treatment on the grounds that, under the new methodology, some officials got better pay than he. In particular, he may not cite the compensation applied retroactively to a staff member because the old methodology was less favourable to him than the new one. The plea is therefore devoid of merit.

9. Since he failed to prove that the measures he challenged were unlawful, there was no reason for the Director-General to allow his request for reconsideration. There is, therefore, no need to entertain the complainant's other claims.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI HILDEGARD RONDÓN DE SANSÓ

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative

NINETY-FIRST SESSION

***In re* Annabi (No. 2)**

Judgment No. 2067

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr Kamal Annabi against the International Labour Organization (ILO) on 9 June 2000 and corrected on 29 August, the ILO's reply of 8 December 2000, the complainant's rejoinder of 7 February 2001 and the Organization's surrejoinder of 4 April 2001;

Considering Article II, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant's career at the International Labour Office, the ILO's secretariat, which he joined in April 1987, is recounted under A in Judgment 1481 delivered on 1 February 1996 in which the Tribunal ruled on his first complaint. Until he retired in December 2000, he held the post of chief interpreter, at grade P.5, in the Official Relations Branch (RELOFF) of the Relations, Meetings and Document Services Department (RELCONF). Among other things he was responsible for the recruitment of free-lance interpreters.

One of his first tasks was to draw up a list of the interpreters to be hired for the 1988 International Labour Conference. On 18 April 1988 the

Treasurer and Financial Comptroller sent a minute to the Director of RELCONF, the complainant's second-level supervisor, objecting to the composition of the interpretation teams recruited for the Conference. In a minute of 20 June 1998 to the Chief of the Personnel Development Branch, the then Director of the Personnel Department, who was appointed to head RELCONF in March 1991, voiced the same sorts of objections. The dispute which was to follow, and which is at the core of this case, focused on two local arabic interpreters whom the complainant refused to hire on the grounds that they were not competent enough. The Administration insisted on their recruitment, in particular for budgetary reasons.

In the years that followed, relations between the complainant and the authors of the two above-mentioned minutes deteriorated steadily, giving rise to a number of incidents perceived by the complainant as "vexations" with the intent of putting "pressure" on him to recruit the two interpreters. In the end he did so, but only after receiving written instructions. For the Administration, all decisions regarding the recruitment of interpreters were based on objective reasons reflecting nothing but the Office's interests.

By a minute of 26 March 1999, the complainant filed an internal complaint with the Director-General under Article 13.2 of the Staff Regulations. The minute stated that he had fallen victim to "administrative harassment" and asked that the necessary steps be taken to put an immediate end to the unwarranted pressure and vexatious conduct on the part of his supervisors, that a letter of apology be addressed to him, that the matter of a grant of within-grade merit increment be reviewed and that a decision be taken on the reclassification of his post. The Director of Personnel replied in a letter of 22 April that the Director-General considered that he could not issue a decision on the internal complaint as it stood and invited the complainant, if he wished, to reformulate it. In a letter of 17 May the complainant answered that he construed the letter of 22 April as notification of the rejection of his internal complaint. However, in response to the Organization's invitation, he sent the Director of Personnel a series of documents to be submitted to the Director-General for the purpose of reconsidering the internal complaint. By a letter of 7 June 1999 the Chief of the Personnel Administration Branch rejected the complainant's analysis and informed him that the Office would hold an inquiry. After reconsidering the internal complaint, the Director-General would either come to a final decision or determine whether further inquiry was needed. By a letter of 14 March 2000 the Director of the Human Resources Development Department notified to the complainant the Director-General's final decision to reject his internal complaint, having found that it was "not possible to conclude that there [had been] anything improper, insofar as every decision taken by [the complainant's] supervisors seem[ed] to have been based on objective reasons that reflected only the Office's interests". That is the impugned decision.

B. The complainant's first plea is that the decisions whereby he was made to recruit the two interpreters at the core of the dispute are unfounded.

He explains that he has always considered them to lack competence, and that his counterparts in the United Nations system generally agree with him.

He disputes the validity of the reasons the ILO gave for ordering their recruitment. Initially, the Treasurer repeatedly cited budgetary considerations, but only in connection with the two interpreters in question. Besides, the amount supposedly saved – approximately 50,000 United States dollars over five years – is negligible. Then, doubtless because the Treasurer knew full well that his budgetary arguments were weak, he in the end appraised the interpreters' competence himself in total disregard of the limits of his authority. That assessment was later "borne out" by two translators. In the complainant's submission the Treasurer lacks the authority to make any credible assessment of an interpreter's competence, and the evaluation carried out by the two translators cannot be regarded as valid since translation and interpretation require quite different skills.

According to the complainant, the decisions ordering him to recruit the two interpreters clearly constituted abuse and were not based on "objective reasons reflecting only the Office's interests", unless the ILO's own interests were confused with the Treasurer's personal interest in pleasing two interpreters, and his supervisors' interest in pleasing the Treasurer.

His second plea is that the decisions that followed his refusal to recruit the two interpreters without a written order are unfounded. In his submission, the order in which events occurred leaves no doubt: as long as he had the support of his supervisors there was no retaliation for his resistance to the unofficial pressure from the Treasurer. But things were not altogether the same when the former Director of Personnel took over as the complainant's second-level supervisor in March 1991, though his first-level supervisor protected him as far as he could. Nevertheless, the Administration tried to get rid of him by proposing the abolition of his post in 1992 and offering him an appointment for only two years (and not a contract without limit of time) from 1 July 1993. The post abolition proposal was withdrawn at the express request of most members of the Governing Body. As to the ILO's unwillingness to grant him an appointment without limit of time, the complainant had to take the matter to the Tribunal in order to secure recognition of his rights (see Judgment 1481). He considers that he lost his last ally in RELOFF when his first-level supervisor was replaced as from July 1995. From then on things changed radically. His new first-level supervisor, the Director of RELCONF, and the Treasurer were free to resort to more insidious reprisals: absence of performance reports, unfounded allegations, denial of his authority, off-handed treatment, discrimination reflected in the failure to grant him a within-grade merit increment and offensive remarks by a senior official. Lastly, the complainant submits that the defendant caused him unnecessary and undue injury by forcing him to work with one of the interpreters in question, since in a letter of 22 January 1999 to the Director of Personnel, she had seriously impaired his dignity and good name. In conclusion, he considers that he has paid dearly for being "a man of principle".

He asks the Tribunal to quash the impugned decision and award him all consequent redress. He also claims costs.

C. In its reply the ILO challenges the complainant's interpretation of the Administration's decisions.

It submits that his complaint is "a long succession of conflicting views about operational matters" and that "working relationship issues as such are not within the Tribunal's competence".

Even if his allegations were borne out by the facts, that would not be evidence of unwarranted treatment or harassment.

The defendant explains that decisions leading to the recruitment of interpreters fall within the Director-General's authority over the organisation of work and within the principle of hierarchy applied in international organisations by virtue of which supervisors have a right and a duty to give orders to their subordinates which the latter are bound to obey.

The ILO submits that its reasons for supervising the complainant's work, particularly the financial aspects of it, were objective and consistent with its right and duty to oversee the expenditure of funds entrusted to it. Article 1.50(a) of the Financial Rules says that it is the responsibility of the Treasurer "to ensure effective internal financial control, sound administration of funds, and the exercise of economy".

In 1989 "procedures for recruitment of interpreters for ILO meetings" were introduced and since then responsibility for recruitment has been shared between the Official Relations Branch – in which the complainant served – the Personnel Department and the Finance Department. The complainant appears to have perceived the application of these new rules as an intolerable restriction on his authority as chief interpreter. But the Administration had several quite legitimate reasons for restricting his authority by associating more closely the Personnel Department and the Finance Department with the recruitment of interpreters in order to accommodate both financial considerations and fairness to interpreters who had already worked for the Organization.

In subsidiary pleas the ILO explains that the overriding principles are that local recruitment must be the rule and non-local recruitment the exception, and that priority should be given to hiring interpreters who have already worked for the Organization. The two interpreters concerned clearly met both criteria. Noting that the complainant is not competent to say how large or small a saving of 50,000 dollars is, the ILO expresses surprise that as a manager he should find the amount negligible bearing in mind that the ILO has suffered several financial crises in the period in question. Lastly, it asserts that it had the two interpreters' competence assessed by two independent linguists, who reported that they found their standard good on the whole.

The ILO denies that its proposal of 1992 to abolish his post was an attempt to "get rid" of the complainant. His accusation of bias is belied by the fact that his post was not the only one affected by his chief's proposals for abolition. As to the Administration's refusal to offer him an appointment without limit of time in 1993, that issue, though linked to the previous one, concerned a decision by the Personnel Department and not his supervisors and was settled once and for all by the Tribunal. The absence of any performance report since 1995, though in breach of the reporting procedure, has in the meantime been set right, a report for the period from 1 January 1995 to 31 December 1998 having been written on 6 September 2000. Lastly, there can have been no discrimination against the complainant in the grant of a within-grade merit increment: Article 6.5 of the Staff Regulations states quite clearly that there is no entitlement to such increments.

D. In his rejoinder the complainant asserts that the Tribunal is competent to entertain working relationship issues as such, as it has demonstrated in Judgment 1609 (*in re* Abreu de Oliveira Souza Nos. 1 and 2 and others).

He maintains that the reasons relied on by the ILO do not justify the hiring of the two interpreters. It was never his intention to challenge the decision to associate the Personnel and Finance Departments more closely for the purpose of recruiting interpreters; nor did he at any time deny that an organisation may legitimately wish to save money, particularly in times of crisis. He nonetheless observes that the ILO does not dispute that the alleged savings were "minute" by comparison with the amount spent on interpretation services. As to the competence of the two interpreters, he notes that the ILO does not answer the main pleas in his complaint. In his submission, in view of its silences and concessions, the ILO's occasional "explanations" lose much of their credibility.

As to the "vexations", he considers that *mutatis mutandis* his view echoes that of the Tribunal in Judgment 986 (*in re* Ayoub No. 2 and others), when it referred to a "run of small amendments". In his case, taken individually the vexatious incidents have no decisive significance, but cumulatively they took their toll on his nerves in the context of a general strategy to harass him.

E. In its surrejoinder the ILO says it is convinced that the dispute arose because the complainant found it hard to get on with his supervisors. Regrettable though the resulting annoyances may have been, the case law holds that he had to put up with them and expect no compensation.

As to whether the Tribunal may entertain disputes arising from work relationships, it asserts that the Tribunal will not interfere as a matter of principle. It points out that even if to hire the two interpreters was against the ILO's interests, the complainant's rights suffered no impairment on that account. Lastly, on the performance of the two interpreters it submits that the complainant has no standing to question the competence of the people who took the decision to hire them.

CONSIDERATIONS

1. The facts of the case are set out under A above.

The salient points are as follows. The complainant, who retired in December 2000, was appointed in 1987 to the post of chief interpreter at grade P.5 in what was then the Relations and Meetings Department of the International Labour Office. As chief interpreter, he was responsible for the recruitment of interpreters to service ILO meetings.

2. By a minute of 26 March 1999, he filed an internal complaint with the Director-General of the Office under Article 13.2 of the Staff Regulations, alleging what he described as "administrative harassment" on the part of some of his supervisors. They were, he says, settling a score because he refused, unless given written instructions, to give in to pressure to hire two interpreters he deemed incompetent. He asked the Director-General to take the necessary steps to ensure: (a) an immediate end to the unwarranted pressure and vexatious conduct inflicted on him by his supervisors; (b) that a letter of apology be written to him; (c) that the question of the grant of within-grade merit increment be reviewed and (d) that a decision be taken about the reclassification of his post.

3. By a letter of 22 April, the Director of Personnel informed the complainant of the Director-General's response. First, the Director-General

was unable to come to any conclusion about most of the internal complaint because, as it stood, the allegation of harassment was too vague, had no ground in fact and was backed up by no evidence.

The letter went on to say that staff have no right to the grant of within-grade merit increments and that the delay in reclassifying his post was due to his having lodged an appeal "which ha[d] not yet been settled".

In short, the Director-General considered that, as it stood, the internal complaint could not give rise to a decision, and that if the complainant wished to reformulate it he should take account of his observations.

On 17 May the complainant sent the Director of Personnel more than 130 documents in support of his internal complaint for submission to the Director-General. On 21 May 1999 he produced further evidence because, he says, the officials in question seemed undeterred by his internal complaint and were still harassing him.

Having reconsidered the internal complaint in the light of the complainant's evidence and observations and the comments of the officials concerned, the Director-General took a final decision to reject the internal complaint of 26 March 1999. The Director of the Human Resources Development Department notified this decision to the complainant, in a letter of 14 March 2000. He also informed the complainant that, regarding his allegation of harassment, the Director-General found no evidence of abuse in that every decision taken by the complainant's supervisors seemed to have been based on objective reasons that reflected only the Office's interests. He added that the Director-General nonetheless "deeply regret[ted] that such a working atmosphere could have arisen and lasted so long without the necessary assistance being given to sort matters out". That is the decision the complainant is challenging.

4. He is asking the Tribunal to quash that decision and award him all consequent redress. He also claims costs.

In his complaint he alleges that he was put under pressure, unofficially at first and then officially, by the Treasurer to hire two locally-based interpreters, but he consistently resisted because he deemed neither to be sufficiently competent. However, he had to recruit them in the end on written orders from the Treasurer and his own supervisors. In addition, not content with forcing the recruitment on him, the Administration "punished" his refusal to fall in with the Treasurer's wishes by repeatedly causing him annoyance and vexation. He cites a lack of any basis for the decisions requiring him to recruit the interpreters and the decisions that followed his refusal to hire them without a written order (particularly the proposed abolition of his post, the refusal to give him an appointment without limit of time, the negative decision concerning the reclassification of his post, the absence of performance reports after 1 January 1995 despite their being necessary to qualify for a merit increment and the undue and unnecessary injury caused by his having to work with one of the two interpreters in question, who had seriously impaired his dignity and good name).

Lastly, he asserts that he has been physically and mentally exhausted by the treatment he received from the Treasurer and his supervisors of the time which, he says, is an obvious breach of the standards of conduct in the international civil service and amounts to nothing less than "administrative harassment".

5. As the Tribunal has consistently held, an allegation of harassment must be borne out by specific facts, the burden of proof being on the party pleading the harassment. In this case a distinction needs to be drawn between the facts pertaining to the period from April 1987 to March 1991 and those pertaining to the period that followed March 1991.

6. In respect of the period from April 1987 to March 1991, the complainant submits that his refusal to act on unofficial advice to be more "flexible" in recruiting interpreters had repercussions on his working conditions in the form of serious accusations against him by a number of interpreters and criticisms from both the Treasurer and the then Director of Personnel. The upshot was that he was called to account for the recruitment of local interpreters and two internal inquiries were held.

However, as he himself concedes, his supervisors of the time supported him and the inquiries cleared him of all blame. That being so, his plea of harassment in respect of the period prior to March 1991 cannot succeed.

By asking him for explanations and holding quite proper inquiries, the Administration gave the complainant an opportunity to defend himself and show that the accusations and criticisms were unfounded. It cannot therefore be accused of harrying him or displaying any bias against him.

7. Concerning the period after March 1991, the complainant states that because, in the absence of a written order, he refused to hire the two local interpreters despite constant pressure from the Treasurer that he felt bound to resist given the poor quality of their work, an attempt was made to get rid of him by proposing the abolition of his post and withholding an appointment without limit of time. Furthermore, he was the victim of regular "vexations": failure to draw up performance reports, unfounded accusations, denial of his authority, offensive remarks by a senior official, off-handed treatment on the part of his supervisors and discrimination in the form of the withholding of a merit increment.

8. It is immaterial whether the ILO's reasons were financial or concerned the competence of the two interpreters, since the decisions to recruit them do not on their own amount to acts of "administrative harassment", even if the complainant deemed them to be unfounded. As the ILO points out, such decisions fall within the Director-General's authority over the organisation of work and within the principle of hierarchy applied in international organisations by virtue of which supervisors have a right and a duty to give orders to their subordinates which the latter are bound to obey while retaining the right to appeal against any decision that causes them injury.

The Tribunal will, therefore, examine what the complainant terms unfounded decisions arising from his refusal to recruit the two interpreters unless instructed to do so in writing, in order to determine whether any measures were taken that caused him injury.

9. The complainant contends that, in order to get rid of him, the abolition of his post was proposed in 1992 and that the Director-General decided to offer him only a fixed-term appointment from 1 July 1993, contrary to what had been agreed at the time of his recruitment.

The ILO retorts that the abolition of the post was proposed for objective budgetary reasons and that the complainant's post was not the only one affected. In any event this proposal was withdrawn at the request of the ILO's Governing Body.

As to the fixed-term appointment, the Organization observes that this calls into question a decision taken by the Personnel Department and not by the complainant's supervisors; and that in any event the matter was settled once and for all by Judgment 1481.

The Tribunal finds no evidence of any harassment insofar as the complainant has had his rights restored and fails to prove bias.

10. The complainant takes the Administration to task for the fact that there has been no appraisal report on his performance since 1995.

The Organization concedes an irregularity in the reporting procedure but gives an unconvincing explanation of it. It asserts that the omission arose because the complainant's supervisors were anxious to avoid a further confrontation at a time when working relations were strained, preferring to wait for an improvement so that they could produce a more favourable report.

Relations being tense, the ILO had a duty to put matters right without evading its obligation to ensure that appraisal reports were established.

But the absence of such reports cannot be taken as evidence of "administrative harassment" even if it shows that, administratively, things had gone awry, as will be explained below under 17.

11. The Tribunal considers that the criticism of the way the complainant recruited interpreters, which he deems unfounded, is part and parcel of a supervisor's job of overseeing subordinates' work. It is to be noted that since the Office introduced "procedures for recruitment of interpreters for ILO meetings", responsibility for recruitment is now shared between the Official Relations Branch, the Personnel Department and the Finance Department.

12. The remarks by a senior ILO official which the complainant deems offensive are in fact a statement to the effect that the complainant

handled the recruitment of interpreters "in a very arbitrary manner". Since the official in question, who was not one of the complainant's supervisors or a member of one of the departments involved in this case, has apologised and explained himself, the statement cannot be regarded as corroborating an allegation of "administrative harassment".

13. The complainant submits that he received no support from his supervisors when an in-house interpreter, one of his subordinates, disregarded his authority as chief interpreter.

The evidence shows that what the complainant saw as a denial of his authority was nothing more than a series of instances in which his supervisors used their own judgment without bias and in the normal course of their duties.

14. The complainant observes that during the internal procedure he submitted various items which, in his view, attest to the off-handed treatment he received from his supervisors. In particular, he cites the content and the "lecturing tone" of a telephone conversation and a minute from the Chief of RELOFF dated 30 September 1999.

Although the tone and terms used by his supervisors may sometimes appear inappropriate, and are unjustifiable notwithstanding the Organization's explanations, the Tribunal cannot regard them as "administrative harassment" given the state of relations in the department and the tone and terms he himself used in communicating with them.

15. The complainant observes that despite his excellent performance, he was not awarded a merit increment, whereas others in his department were, although the difference in their ratings did not warrant such a difference in treatment.

The complainant offers no specific evidence of discrimination and Article 6.5 of the Staff Regulations confers no right to an automatic award of a within-grade merit increment.

Consequently, he may not invoke the withholding of the increment to support his allegation of "administrative harassment".

16. The conclusion is that although, contrary to the ILO's assertion, the complaint is receivable, there being nothing to prevent the complainant from citing an accumulation of events over time to support an allegation of harassment, his plea of "administrative harassment" cannot succeed.

17. The evidence shows, however, that the ILO did fail in the duty incumbent on all international organisations to treat staff members with dignity and avoid causing them undue and unnecessary injury.

As it admitted in the letter of 14 March 2000, the ILO was aware of the unhealthy working atmosphere in the department where the complainant was employed. That atmosphere was allowed to linger "without the necessary assistance being given to sort matters out". Moreover, it failed to draw all the necessary conclusions from the fact that one interpreter had made unfounded accusations against the complainant which had seriously impaired his good name and dignity.

Lastly, the absence of appraisal reports on the complainant's performance since 1995 betrays unsound administration for which the report written on 6 September 2000, three months before he was due to retire, cannot provide relief. The complainant specifies no amount for his claim to financial compensation. The Tribunal considers that the moral injury he suffered warrants redress in an amount of 3,000 euros.

18. Since his claims succeed in part, he is entitled to costs, which the Tribunal sets at 20,000 French francs.

DECISION

For the above reasons,

1. The ILO shall pay the complainant the sum of 3,000 euros in moral damages.
2. It shall pay him 20,000 French francs in costs.
3. His other claims are dismissed.

In witness of this judgment, adopted on 9 May 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

NINETY-FIRST SESSION

***In re* Bousquet (No. 8)**

Judgment No. 2068

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Mr Karl Bousquet against the European Patent Organisation (EPO) on 4 February 2000 and corrected on 9 March, the EPO's reply of 26 May, the complainant's rejoinder of 29 September and the Organisation's surrejoinder of 21 December 2000;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Frenchman who was born in 1952, is an examiner at the Berlin sub-office of the European Patent Office, the EPO's secretariat, and a staff representative. In 1996, he and several colleagues in Berlin, The Hague and Munich filed internal appeals in the course of a wage dispute (see Judgments 1931, *in re* Baillet No. 3, and 1932, *in re* Vollering No. 17). The Appeals Committee decided to examine the appeals (all registered as RI/33/96) at its sessions of October 1997 in Berlin and June 1998 in The Hague. On 22 September 1997 the complainant informed the Appeals Committee that he wished to be heard and would be accompanied by another appellant, Mr Jean-Jacques Criqui, who serves at The Hague

On 9 October 1997 Mr Criqui submitted to the Administration, through the chairman of the Staff Committee, a duty travel request so that he could go to Berlin on 15 October in order to assist the complainant at his hearings. Travel orders are issued for officials deemed to be travelling on EPO business. The expenses incurred are covered by the Office within the limits set in the Service Regulations for Permanent Employees of the European Patent Office. The request was refused on 10 October. The same day the complainant wrote to the Principal Director of Administration referring to the refusal and asking "officially for the second time" to be assisted by Mr Criqui. He asked the Director to reconsider the position taken by the Administration or else to treat his letter as a notice of appeal. The Director rejected the request in a letter of 13 October. On 14 October Mr Criqui again submitted his travel request and attached the complainant's letter of 10 October. That request was also rejected (see Judgment 2069, *in re* Criqui No. 4, delivered this day). Mr Criqui was present at the hearings, which were held on 15 October.

On 18 October 1997 the Director of Personnel Development informed the complainant of the referral of his appeal to the Appeals Committee with the reference RI/52/97. After hearing the complainant, who was once again assisted by Mr Criqui, the Appeals Committee unanimously recommended in its opinion of 18 October 1999, sent to the complainant on 22 October, to reject the appeal. By a letter of 4 November 1999, the Director of Personnel Development informed the complainant that the President of the Office had decided to reject his appeal.

B. In support of his complaint, the complainant cites Article 113(3) of the Service Regulations, which provides that:

> "The appellant has the right to be heard. He may be represented or assisted by any person of his choice."

However, Article 113(7), indicates that:

> "Any costs incurred by the appellant in the course of the appeal proceedings, in particular fees payable to a person chosen from outside the Organisation to represent or assist him, shall be borne by him, unless the appointing authority acting on a recommendation of the Appeals Committee decides otherwise."

But, the complainant argues, it is plain from the wording that the intent of the provision is to limit the costs incurred in appeal procedures, and particularly to curb the heavy expenditure on enlisting assistance from outside the Office. In this case, the costs were kept to a minimum, since he enlisted the assistance of an employee of the Office who was paid no fees. Furthermore, Mr Criqui was the only person sufficiently versed in the subject to be able to assist him. The choice of venue of the Appeals Committee's session was not his and he cannot be held responsible for the geographical dispersion of the Office. Consequently, it was not he who incurred the costs and Article 113(7) does not apply. He submitted the travel request in good faith: the Organisation's practice has always been to meet assistance costs, such as air tickets, hotel expenses and leave. He contends that the discretion allowed the appointing authority gives rise to uncertainty in law.

The complainant seeks the quashing of the President's final decision, repayment of the expenditure on Mr Criqui's assistance, and compensation to Mr Criqui for the day's leave that he had to take. He also claims 2,000 German marks in moral damages, and costs.

C. The EPO replies that the complaint is irreceivable. For one thing the complainant did not have to pay Mr Criqui's travel expenses, as they were reimbursed by the Staff Union and for another, he may not submit claims on someone else's behalf.

In subsidiary pleas, the EPO submits that by refusing the duty travel request it acted in accordance with the rule set in Article 113(7) of the Service Regulations. The circumstances did not warrant a waiver of that rule, since the Appeals Committee was to hear internal appeals RI/33/96 in both Berlin and The Hague. Mr Criqui's silence at the hearings in Berlin suggests that the purpose of his attendance was not so much to assist the complainant, who is an expert in pay matters, as to prepare himself for the hearings in The Hague. The EPO adds that Mr Criqui could have deducted the time devoted to assisting the complainant from the quota allowed him for staff representation duties. The EPO challenges the complainant's narrow interpretation of Article 113(7). It has never been the EPO's practice to reimburse assistance expenses automatically. The complainant's case is not comparable to those in which it agreed to reimburse expenses, because the Appeals Committee chose a venue other than his duty station. So there was no breach of equal treatment.

Deeming the complaint to be clearly vexatious, the EPO requests the Tribunal to award all costs against the complainant.

D. In his rejoinder the complainant recalls that by a letter of 25 June 2000 he sought a joinder of this complaint with Mr Criqui's fourth complaint.

He contends that it was the Office and the Chairman of the Appeals Committee who grouped together his appeal and those filed by employees in Berlin, The Hague and Munich and who decided to hold hearings in different places. The costs were therefore incurred by the Office and Article 113(7) does not apply. He explains that the payment made by the Staff Union was only an advance and a token of its support for him, not an obligation. He requests reimbursement of the expenses so that he in turn can repay the Staff Union. In his view, challenging as they did "the fundamental principles and guarantees of the rights of employees", appeals RI/33/96 were exceptional and warranted the reimbursement of expenses. He submits that his so-called expertise in pay matters does not impinge upon his right to be assisted. He refutes the Organisation's argument that Mr Criqui could have deducted his day's leave from the time allotted to staff union representation. That time may be used only for official union duties, which do not cover the case in point. Besides, Mr Criqui was no longer a staff representative. Lastly, the EPO adduces no evidence for its allegations concerning the real reason for Mr Criqui's attendance at the hearings in Berlin.

E. In its surrejoinder the EPO observes that, since he was heard by the Appeals Committee at his own duty station, the fact that the Office comprises several duty stations caused the complainant no injury. The presence of Mr Criqui in Berlin was the result of the complainant's own personal choice, so the latter must assume the financial consequences. The Appeals Committee grouped together the appeals filed by employees in the same duty station in order to rationalise procedure. The EPO points to the contradictions between the complainant's statements and those of Mr Criqui in his fourth complaint concerning the capacity in which the latter travelled to Berlin. It maintains that, even though Mr Criqui was no longer a member of the Staff Committee he could act at its request and use part of the time allocated to staff representation. It denies that the appeals challenged "the fundamental principles and guarantees of the rights of employees"; on the contrary, in view of what the appellants had obtained, they were vexatious.

CONSIDERATIONS

1. The complainant serves the EPO at its Berlin sub-office as an examiner.

In 1996 he and several colleagues serving in Berlin, The Hague, and Munich lodged appeals against a decision concerning a wage dispute. Since they pursued the same claims, the appeals were registered together as RI/33/96 and forwarded to the Appeals Committee which decided to hear them at two sittings, one to be held on 15 October 1997 in Berlin and the other, on 24 June 1998 in The Hague.

The complainant, who was to be heard in Berlin, sought the assistance of Mr Criqui, a colleague serving in The Hague. On 9 October 1997 the latter filed a duty travel request through the Staff Committee so that he could go to Berlin for that purpose.

Mr Criqui's request having been refused on 10 October, the complainant wrote to the Principal Director of Administration on the same day asking the Administration to reconsider its refusal and reiterating his request for Mr Criqui's assistance. He specified that if the travel request was rejected, his letter was to be treated as a notice of appeal.

The Principal Director of Administration turned down the complainant's request. On 18 October 1997 the Director of Personnel Development informed the complainant that his appeal, registered as RI/82/97, had been referred to the Appeals Committee.

Appeals RI/33/96 concerning the wage dispute were dismissed, after the Appeals Committee's opinion found against the appellants. The Committee's opinion on these appeals contained no recommendation that the Organisation should bear the complainant's costs notwithstanding that he had already filed his appeal against the rejection of the travel request.

On 18 October 1999 the Committee unanimously recommended rejecting appeal RI/82/97 as devoid of merit. By a letter of 4 November 1999 the Director of Personnel Development informed the complainant that, on the Committee's recommendation, the President had decided to reject his appeal. That is the decision he is now challenging.

2. The complainant is asking the Tribunal to quash the impugned decision and to award him full redress in law, and in particular to order the Organisation:

- to reimburse the amounts spent (air ticket, airport transfers, hotel expenses) on Mr Criqui's assistance;
- to grant Mr Criqui an additional day's leave or payment in lieu, to compensate for the day's leave he had to take to assist the complainant;
- to award him 2,000 German marks in moral damages;
- to pay his costs.

3. The complainant asks the Tribunal to join this complaint with Mr Criqui's fourth.

For the reasons set out in Judgment 2069 (*in re* Criqui No. 4) delivered this day, the Tribunal sees no need to allow that request.

4. The complainant considers that Article 113(3) of the Service Regulations establishes a very important principle by allowing appellants to be represented by the person of their choice before the Appeals Committee. In his submission, paragraph 7 of the same article, which constitutes the Organisation's sole basis in law for rejecting his claim to reimbursement, was adopted for the purpose of limiting the costs of appeals and in particular to cut back excessive expenditure on outside assistance. Consequently, the rule does not apply to him because he chose the only person well versed enough in the issues raised by appeals RI/33/96 to assist him. It so happened that that person served in The Hague.

He concludes that, since he did not choose the venue for the hearings and is not to blame for the Office's geographical dispersion, it was not he who incurred the costs.

He adds that he kept expenditure to a minimum by choosing someone from the Office, so avoiding lawyer's fees. Expenditure was thus much the same as it would have been had his hearings been in The Hague, since according to practice the Office would have borne the cost of his travel (air ticket, airport transfers, hotel expenses) and of a day's leave for his assistant.

5. The Organisation is asking the Tribunal to dismiss the complaint as clearly irreceivable or, failing that, as totally devoid of merit. On the latter point it endorses the Appeals Committee's unanimous opinion that Article 113(7) allows the Organisation to bear appeal costs only in exceptional cases, and that since in this case the reason for having two venues was to enable all appellants to be heard at their own duty stations, there can be no objection to the Administration's refusal to pay for the assistant chosen by the complainant under Article 113(3) to travel from The Hague (duty station) to Berlin (venue of the hearings).

6. Article 113(3) says:

> "The appellant has the right to be heard. He may be represented or assisted by any person of his choice."

and Article 113(7) provides that:

> "Any costs incurred by the appellant in the course of the appeal proceedings, in particular fees payable to a person chosen from outside the Organisation to represent or assist him, shall be borne by him, unless the appointing authority acting on a recommendation of the Appeals Committee decides otherwise."

7. It is plain from the rules cited above that the complainant had the right to be assisted by any person of his choice at the hearings of the Appeals Committee, wherever it sat.

He asserted that right by enlisting the assistance of a colleague serving at The Hague. That involved his assistant in a journey to Berlin, which raised the problem of who was to bear the costs incurred pursuant to Article 113(7) of the Staff Regulations. Contrary to what the complainant believes, that article does not apply only when assistance is sought outside the Organisation. It lays down the rule that all costs incurred by an appellant in the course of appeal proceedings will be borne by him, unless the appointing authority decides otherwise on a recommendation from the Appeals Committee.

8. It is plain on the evidence that it was the complainant who incurred costs in the internal procedure, since he saw fit to enlist the assistance of an

official who had to travel from his duty station in order to attend the Appeals Committee's hearings in Berlin. He was free to choose someone who did not need to travel to another duty station and thus avoid costs, particularly as the person he chose was to be heard at The Hague, and so could have spoken for the complainant at his own hearings, since all the appeals pursued the same claims.

The only issue remaining is whether the complainant is entitled to reimbursement of the costs incurred.

9. The Tribunal may quash the Office's decision only if it shows breach of the rules governing payment of expenses or of relevant general principles of law.

10. First, his claim to an additional day's leave for Mr Criqui cannot succeed. It is not for the complainant, but for Mr Criqui himself, to submit such a claim, which indeed he has, in the complaint ruled on in Judgment 2069.

11. In support of its refusal to bear the costs, the EPO submits – and the complainant does not demur – that he made no claim to reimbursement in appeal RI/33/96 and that Mr Criqui's travel costs were covered by the Staff Union.

12. The evidence shows that during the appeal, though deploring the EPO's denial of a duty travel request for his assistant, the complainant submitted no formal travel claim, so the Appeals Committee made no recommendation on the matter to the appointing authority in its report on appeals RI/33/96.

In the Tribunal's view that fact affords no grounds for declaring his later claim to repayment irreceivable.

In examining appeal RI/82/97 the Committee found that the separate claim to reimbursement of costs was receivable because if the Office had taken a separate decision about the repayment of costs it could be subject to challenge; and it is right on that score.

Accordingly, even though the complainant submitted no such claim in the context of appeals RI/33/96, the fact that the Administration rejected his later claim to payment by a separate decision entitled him to file an appeal claiming repayment of the costs incurred, despite their having been covered by the Staff Union.

13. Nonetheless, the President's decision was taken within the bounds of his discretion and shows no such breach of the Organisation's rules or of general principles as to warrant setting it aside.

The complainant's claim to reimbursement cannot be justified by any exceptional circumstances. The cases he cites in asserting that it is the Organisation's practice to cover travel costs are not the same as the case at bar and, therefore, afford no relevant grounds for the quashing of the impugned decision, particularly as Article 113(7) provides that the Organisation bears such costs only in exceptional instances, to be determined on a case-by-case basis upon recommendation of the Appeals Committee.

The conclusion is that the complaint must be dismissed.

14. The Organisation asks the Tribunal to award all costs against the complainant on the grounds that the complaint is vexatious.

The Tribunal is satisfied that the complaint is not vexatious and so disallows the counterclaim.

DECISION

For the above reasons,

1. The complaint is dismissed.
2. The Organisation's counterclaim is also dismissed.

In witness of this judgment, adopted on 9 May 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

NINETY-FIRST SESSION

***In re* Criqui (No. 4)** **Judgment No. 2069**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr Jean-Jacques Criqui against the European Patent Organisation (EPO) on 13 May 2000 and corrected on 29 May, the EPO's reply of 25 August, the complainant's rejoinder of 29 September and the Organisation's surrejoinder of 21 December 2000;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Frenchman who was born in 1957, is an examiner at the European Patent Office, the EPO's secretariat; his duty station is The Hague. In 1996 he and several colleagues serving in Berlin, The Hague and Munich filed internal appeals concerning a wage dispute (see Judgments 1931, *in re* Baillet No. 3, and 1932, *in re* Vollering No. 17). The Appeals Committee decided to examine the appeals (all registered as RI/33/96) at its sessions of October 1997 in Berlin and June 1998 in The Hague. On 22 September 1997 one of the appellants, Mr Bousquet, who serves in Berlin, informed the Appeals Committee that he wished to be heard and would be accompanied by the complainant.

On 9 October 1997 the complainant submitted to the Administration, through the chairman of the Staff Committee, a duty travel request so that he could go to Berlin on 15 October in order to assist Mr Bousquet at his hearings. Travel orders are issued for officials deemed to be travelling on EPO business. The expenses incurred are covered by the Office within the limits set in the Service Regulations for Permanent Employees of the European Patent Office. The request was refused on 10 October. The same day Mr Bousquet wrote to the Principal Director of Administration referring to the refusal and asking "officially for the second time" to be assisted by the complainant. He asked the Director to reconsider the position taken by the Administration or else to treat his letter as a notice of appeal. The Director rejected the request in a letter of 13 October (see Judgment 2068, *in re* Bousquet No. 8, delivered this day). On 14 October the complainant again submitted a duty travel request – this time on his own behalf – accompanied by a letter from Mr Bousquet dated 10 October. That request was also rejected. The complainant was present at the hearings, which were held on 15 October.

By a letter of 5 December 1997 the complainant requested the President of the Office to revoke the rejection of his duty travel request or, failing that, to treat his letter as a notice of appeal. In his reply of 30 December 1997 the President explained the reasons for his refusal and asked the complainant to reconsider his decision to file an appeal. The complainant refused and the appeal was registered under the reference RI/106/97. Mr Bousquet having covered his travel expenses, the complainant's only remaining claim was to compensation for the day's leave he had to take to travel to Berlin. In its opinion of 31 January 2000 a majority of the Appeals Committee recommended rejecting the appeal. In a letter of 11 February 2000, which is the impugned decision, the Director of Personnel Development informed the complainant of the President's decision to reject his appeal.

B. In support of his complaint, the complainant cites Article 113(3) of the Service Regulations, which provides that:

> "The appellant has the right to be heard. He may be represented or assisted by any person of his choice."

He observes that, to justify its decision, the EPO relied on Article 113(7), which indicates that:

> "Any costs incurred by the appellant in the course of the appeal proceedings, in particular fees payable to a person chosen from outside the Organisation to represent or assist him, shall be borne by him, unless the appointing authority acting on a recommendation of the Appeals Committee decides otherwise."

But, the complainant argues, it is plain from the wording that the intent of the provision is to limit the costs incurred in appeal procedures, and particularly to curb the heavy expenditure on enlisting assistance from outside the Office. In his case, the costs were kept to a minimum as he is an employee of the Office and charged no fee. Moreover, he was the only person sufficiently versed in the subject to be of assistance to Mr Bousquet. The choice of venue of the Appeals Committee's session was not his and he cannot be held responsible for the geographical dispersion of the Office. The costs were therefore incurred indirectly by the Office and Article 113(7) does not apply. He submitted the travel request in good faith: the Organisation's practice has always been to meet assistance costs, such as air tickets, hotel expenses and leave. He contends that the discretion allowed the appointing authority gives rise to uncertainty in law.

The complainant asks the Tribunal to join his complaint and Mr Bousquet's eighth complaint, set aside the impugned decision, order the EPO to reimburse the expenses incurred and compensate the day's leave that he had to take, pay Mr Bousquet 2,000 German marks in moral damages and grant Mr Bousquet and himself costs.

C. The EPO replies that the complaint is partly irreceivable. The complainant's claim to reimbursement shows no cause of action since Mr Bousquet met the expenses and was repaid by the Staff Union. As for the claim to moral damages for Mr Bousquet, the complainant lacks standing to act on his behalf.

On the merits, the EPO refers to its reply to Mr Bousquet's eighth complaint (see Judgment 2068, under C). It points out that although appellants may be represented or assisted by any person of their choice, that does not imply automatic reimbursement by the Office of the expenses incurred. It challenges the complainant's interpretation of

Article 113(7) and argues that the assistance he gave to Mr Bousquet was not indispensable or even necessary, since there was at least one other employee – in Berlin – conversant with remuneration issues. It submits that, contrary to the opinion of a minority of the Appeals Committee, the complainant did not assist Mr Bousquet as an expert acting on behalf of the Staff Committee: the complainant's appeal concerned the refusal of the request he had made in an individual capacity on 14 October 1997. In any event, the rules governing the competence of the Staff Committee do not apply in the present case and a travel order was out of the question. Furthermore, if it had been in the interest of the Staff Committee to send the complainant to Berlin, he would have been able to deduct the leave from the hours allocated to him for union activities. In any event, whether he assisted Mr Bousquet in an individual capacity or on behalf of the Staff Committee, it was not incumbent upon the Office to grant him a day's leave.

The EPO leaves the issue of the joinder of the complaints to the Tribunal.

D. In his rejoinder the complainant contends that it was the Office and the Chairman of the Appeals Committee who grouped together his appeal and those filed by employees in Berlin, The Hague and Munich and who decided to hold hearings in different places. The costs were therefore incurred by the Office and Article 113(7) does not apply. He points out that the staff member in Berlin who was conversant with remuneration issues had signed the compromise challenged by the appeals registered as RI/33/96, so there was no question of his assisting Mr Bousquet. He explains that the payment made by the Staff Union was only an advance and a token of its support for him, not an obligation. He indicates that he acted on his own initiative and not on the instructions of the staff representatives. Only the second duty travel request, submitted on his own behalf, is valid. In his view, challenging as they did "the fundamental principles and guarantees of the rights of employees", the appeals registered as RI/33/96 were exceptional and warranted reimbursement of costs. He refutes the Organisation's argument that he could have deducted his day's leave from the time allotted to staff union representation. That time may be used only for official union duties, which do not cover the case in point.

The complainant alters his claims: he no longer seeks reimbursement of the expenses incurred or an award of moral damages for Mr Bousquet, and confines the claim to his own costs.

E. In view of those changes, in its surrejoinder the EPO withdraws its objections to receivability.

It observes that, because they were each heard by the Appeals Committee at their own duty stations, the fact that the Office comprises several duty stations caused neither the complainant nor Mr Bousquet any injury. The complainant's presence in Berlin was the result of a personal choice by Mr Bousquet, so it is the latter who must assume the financial consequences. The Appeals Committee grouped together the appeals filed by employees in the same duty station in order to rationalise procedure. The EPO points to the contradictions between the complainant's statements and those of Mr Bousquet in his eight complaint concerning the capacity in which the former travelled to Berlin. It maintains that the complainant was entitled to use part of the time allocated to staff representation. It denies that the appeals challenged "the fundamental principles and guarantees of the rights of employees"; on the contrary, in view of what the appellants obtained, they were vexatious.

CONSIDERATIONS

1. The complainant serves the EPO at The Hague as an examiner.

In 1996 he and several colleagues serving in Berlin, The Hague, and Munich lodged appeals against a decision concerning a wage dispute. Since they pursued the same claims, the appeals were registered together as RI/33/96. The Appeals Committee decided to hear them at two sittings, one to be held on 15 October 1997 in Berlin and the other, on 24 June 1998 in The Hague.

Mr Bousquet, one of his colleagues, chose the complainant to assist him at the hearings in Berlin. The complainant accordingly filed a duty travel request through the Staff Committee. The request having been rejected, he had to deduct a day from his annual leave in order to travel to Berlin. Deeming the rejection unwarranted, he challenged it in an appeal filed on 5 December 1997.

The President of the Office upheld his rejection by a letter of 30 December 1997. The appeal, registered as RI/106/97, was referred to the Appeals Committee.

On 11 February 2000 the Director of Personnel Development informed the complainant that the President had decided to reject his appeal on the Committee's recommendation. That is the decision he is challenging in this complaint.

2. In addition to joinder of his complaint with Mr Bousquet's eighth (see *Judgment 2068* delivered this day), the complainant is asking the Tribunal to quash the decision of 11 February 2000 and to award him full redress in law, and in particular to order the Organisation:

- to reimburse what he spent (air ticket, airport transfers, hotel expenses) on travelling to Berlin to assist Mr Bousquet;
- to grant him an additional day's leave or payment in lieu, to compensate for the day's leave he had to take;
- to award Mr Bousquet moral damages in an amount of 2,000 German marks;
- to pay his and Mr Bousquet's costs.

In his rejoinder, however, he reduces his claims. He no longer seeks reimbursement of expenses or an award of moral damages for Mr Bousquet, and confines the claim to his own costs.

The application for joinder

3. The Tribunal finds that the conditions for joinder are not met in this case.

It is true that the two complaints rest on the same facts. However, they challenge different decisions, the complainants are not the same, and the claims rest on different pleas and are not the same. The complainant limits his claims to an additional day's leave and costs, whereas Mr Bousquet in his eighth complaint claims repayment of the costs incurred in the internal appeal RI/33/96.

The merits

4. The complainant objects that the EPO denied him an extra day's leave in compensation for the day he had to take to assist Mr Bousquet in Berlin.

The case turns on whether it was possible for the complainant to assist his colleague in Berlin without having to deduct the time he needed from his annual leave.

5. The EPO based its rejection of the complainant's request on the reasons it presented before the Appeals Committee and the latter's majority opinion.

In its submissions to the Committee the Office contended that, according to Article 113(3) of the Staff Regulations, the person chosen to assist the appellant may not claim repayment of his expenses, and any such claim must be made by the appellant enlisting the assistance.

Article 113(3) says:

> "The appellant has the right to be heard. He may be represented or assisted by any person of his choice."

and Article 113(7) provides that:

> "Any costs incurred by the appellant in the course of the appeal proceedings, in particular fees payable to a person chosen from outside the Organisation to represent or assist him, shall be borne by him, unless the appointing authority acting on a recommendation of the Appeals Committee decides otherwise."

The above provisions afford no basis for the rejection of the complainant's claim. Before both the Appeals Committee and the Tribunal, the complainant withdrew some of his claims and maintained only the claims to an additional day's leave and his costs. Article 113(3), establishing that an appellant may be assisted before the Appeals Committee by the person of his choice, applies in this case. But Article 113(7) does not: it deals only with payment of costs incurred, whereas the complainant's only remaining claim was to an additional day's leave.

Relying on Articles 34(2), 77(1) and 113(3) and (7), of the Service Regulations, the Appeals Committee found that: the conditions for granting a duty travel request were not met; an appellant's entitlement to be represented or assisted by a person of his choice in internal proceedings does not imply that the latter's costs would be met or special leave granted; in this case the general principles of international civil service law did not require the Office to grant additional leave; and the complainant failed to show that his presence in Berlin was indispensable or at least necessary.

Article 34(2) states:

> "The duties undertaken by members of the Staff Committee and by the permanent employees appointed by the Committee to the bodies set up under these Service Regulations or by the Office shall be deemed to be part of their normal service. The fact of performing such duties shall in no way be prejudicial to the person concerned."

Article 77(1) says:

> "A permanent employee holding a travel order requiring him to work at or travel to a place other than that at which he is employed shall be entitled to:
>
> a) a daily subsistence allowance, in accordance with the provisions of Article 78,
>
> b) the reimbursement of travelling expenses necessarily incurred for such purpose, in accordance with the provisions of Article 79."

Article 113(3) and (7) are cited under 5 above.

Those provisions on their own and in the absence of other reasons afford insufficient grounds for denying the complainant an additional day's leave. Even though the conditions set in Articles 34(2) and 77(1) for treating travel as part of the employee's normal service or as official business were not met, it cannot properly be inferred that the time invested in assisting a colleague before the Appeals Committee, as Article 113(3) allows, must be deducted from annual leave.

The defendant cites Article 113(7), which is about the payment of costs, to justify its refusal of the complainant's claim to an additional day's leave. But that article is immaterial. And although the rules, cited by the defendant, do not require the Office to grant additional leave, they do not bar such leave from being granted in circumstances such as these. Lastly, the provisions cited do not lay down any obligation to show that attendance at the appeal hearings must be indispensable, or at least necessary, in order to assist a colleague and be granted the time necessary to do so.

6. The Organisation states clearly in its brief that paragraphs 3 and 7 of Article 113 constitute the right bases in law for its denial of the complainant's claim.

The above-mentioned provisions of Article 113 do allow an EPO staff member who has filed an appeal to be assisted before the Committee by the person of his choice, whether or not the latter is an employee of the Office. But nothing in those provisions, particularly in Article 113(7), which deals only with costs incurred in appeals, can justify the refusal to grant the complainant an additional day in compensation for the day he had to take in order to assist his colleague.

7. Neither the texts cited, nor the defendant's arguments, nor the circumstances of the case afford proper grounds for the assertion that the complainant had to deduct a day from his annual leave in order to assent to his colleague's request for assistance.

The complainant contends, and the Organisation does not seriously deny, that staff members assisting colleagues before the Committee usually do so during office hours. In the Tribunal's view, such mutual legal assistance is also in the Organisation's interests.

8. In these circumstances, in view of the exceptional nature of the journey the complainant had to undertake to assist his colleague in the hearings before the Appeals Committee, the complainant is justified in asking for the day he spent in Berlin not to be deducted from his annual leave. The impugned decision must, therefore, be set aside insofar as it denies the complainant an additional day's leave.

9. Since the complainant's claims succeed in part, he is entitled to costs in an amount of 400 euros.

DECISION

For the above reasons,

1. The decision of 11 February 2000 of the President of the Office is set aside insofar as it denies the complainant an additional day's leave.
2. The EPO shall grant the complainant an additional day's leave.
3. It shall pay the complainant 400 euros in costs.
4. The complainant's other claims are dismissed.

In witness of this judgment, adopted on 9 May 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

NINETY-FIRST SESSION

***In re* Placci (No. 3)**

Judgment No. 2070

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mrs Marlene Placci against the International Telecommunication Union (ITU) on 19 June 2000 and corrected on 19 July, the ITU's reply of 31 October 2000, the complainant's rejoinder of 25 January 2001, the complainant's additional submission of 16 February and the Union's letter of 9 April 2001 provided in lieu of a surrejoinder;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a British national born in 1947, joined the ITU in 1988. Facts relating to her employment at the ITU can be found in Judgment 1976 on her first complaint. She sustained a foot injury on 20 August 1992, which was recognised as being service-incurred. She underwent an operation and resumed work on a full-time basis on 10 February 1993.

She continued to experience problems with her foot. The Director of the United Nations Joint Medical Service at Geneva confirmed in a memorandum of 22 January 1999 sent to the Chief of the Pensions and Insurance Service at the ITU that the complainant's symptomatology resulted from the injury sustained in 1992. On 8 November 1999 a medical specialist, Dr H., issued a report on the complainant's case confirming a 25 per cent loss of function of the left lower extremity, equivalent to a 10 per cent impairment of the whole person, based on the American Medical Association's "Guides to the Evaluation of Permanent Impairment".

The complainant wrote to the Secretary-General on 24 February 2000 seeking redress for her service-incurred injury and claiming financial compensation for, inter alia, partial permanent invalidity. She claimed that, given her partial impairment, she should have worked a reduced number of hours over the eight-year period since her accident; she wanted the hours worked "in excess" treated as overtime and her sick leave over the years treated as "special sick leave". On 6 March the Chief of the Pensions and Insurance Service informed her that the Secretary-General had authorised the convening of an ad hoc Compensation Board to assess her partial disability.

At the end of a period of sick leave taken by the complainant the Chief of the Personnel and Social Protection Department wrote to her on 23 March 2000 saying that any future absences from work relating to her accident had to be supported by a medical certificate with a full and detailed report by her medical specialist, failing which such absences would be treated as ordinary sick leave. On 3 April she wrote again to the Secretary-General. In that letter she asked to have all her absences in relation to her injury treated as "special sick leave"; in the event of the ad hoc Compensation Board not meeting she wanted a medical board to be convened.

On 28 April 2000 the Secretary-General acknowledged her letters of 24 February and 3 April 2000. He said that the ad hoc Compensation Board would meet as soon as possible and that her request for the convening of a medical board was premature since such a board could only be convened after the Compensation Board had reported and he had taken a decision. He confirmed that for all future absences connected with her injury she would have to provide justification from a specialised practitioner.

The complainant subsequently filed two internal appeals. In one, filed on 1 May 2000 – appeal No. 8 – she sought a decision as to what compensation was due to her and claimed various lump-sum payments. In the other, filed on 10 May 2000 – appeal No. 9 – she principally asked that her absences related to her injury be treated as "special sick leave". The Appeal Board was not convened.

The Compensation Board met three times after the filing of this complaint. In its report of 10 October, the Board recognised that the complainant was suffering from a 10 per cent impairment of the whole person as a consequence of her injury, for which she was entitled to compensation; it recommended paying her the sum of 15,714.80 United States dollars, corresponding to a 10 per cent permanent incapacity. It also recommended that her working environment should be adapted to take into account her mobility problems. The Secretary-General fully endorsed those recommendations and communicated his decision to the complainant on 26 October 2000.

B. The complainant is challenging the implied rejection of her claims made on 24 February 2000. She argues that she has exhausted the internal means of redress, since the Appeal Board failed to begin its deliberations within seven weeks from the lodging of her appeal No. 8, as required by paragraph 4 c) of Rule 11.1.1. Furthermore, the Secretary-General did not send his reply on her appeal to the Chairman of the Board within four weeks as required by paragraph 4 a) of the same Rule.

She had doubts as to whether the Compensation Board would really meet. She states that ITU Rule 6.2.4 and Appendix D to the United Nations Staff Rules do not specify that a staff member has to wait indefinitely for financial compensation in the event of disability attributable to official duties. Although the Administration has obtained information on her case from numerous medical practitioners she has so far received no financial compensation.

On the subject of her sick leave, she says that Staff Rule 6.2.2 does not specify that a medical certificate has to be obtained from a specialist. She should therefore be allowed to obtain one from a general practitioner. Rule 6.2.2 has to be applied to her in the same way as to other staff members. Moreover, since her injury was service-incurred, she should have been given a special leave entitlement. Since 1992 she has had to "adapt to an invalid's life style" while working full time as though she was completely fit for work. She became unable to drive and had to rely on costly forms of transport at her own expense; also her work environment has not been adapted to her handicap.

Had she had an appropriate job description an orthopaedic surgeon would have been able to determine what reduction in working hours was necessary. She states that she suffered psychological harassment through not having a relevant job description. As a result she is suffering from a "major depressive syndrome".

In her claims the complainant mainly seeks payment of compensation for her service-incurred injury, based on "a 25% loss of function since 1992" and including compound interest. She wants a medical board convened in connection with her "major depressive syndrome" and asks for a "permanent invalidity pension". In addition, she asks for a reduction of her working hours in future, and wants a proportion of the hours she has worked since her injury to be regarded as overtime and paid as such. She seeks reimbursement of her medical expenses and lump-sum payments on several counts, chiefly to compensate for the mobility problems experienced since 1992 and the long delays on the part of the Administration in settling the matter of her compensation. She wants the Tribunal to order the Administration to take measures to stop mobbing, give her a relevant job description, transfer her out of her unit and adapt her office to take account of her foot condition. Furthermore, she wants the ITU to treat absences related to her foot injury as "special sick leave"; confirm whether Rule 6.2.2 applies to her in the same way as to other staff, and bear the cost of her exceptionally having to consult specialists in order to obtain sick leave; provide details of sums paid by the *Vaudoise* insurance company since 1992 and confirm that "no amount for compensatory damages has been paid to [a] third party and/or is owed to her"; and make available to her a medical report supplied by Dr D. (following a consultation in May 2000). Should the Tribunal decide that it is not competent to rule on her case she wants the Compensation Board to decide some of the above matters related to her injury. She also claims costs.

C. In its reply the Union contends that the complaint is premature and therefore irreceivable. Under the terms of paragraph 4 e) of Rule 11.1.1 the Appeal Board has ten weeks from the date of the filing of an appeal in which to produce its report. She lodged her complaint with the Tribunal before the expiry of that time period and thus failed to exhaust the internal means of redress.

The complaint is also devoid of merit. The ITU assumed financial liability for her accident and the costs of her successive treatments were reimbursed. It experienced difficulties in determining whether her sick leave constituted ordinary sick leave pursuant to Rule 6.2.2 or whether it was sick leave associated with her work-related accident. That is why it instituted a certification system in respect of her absences. In the absence of a certificate, issued by a specialist and approved by the Joint Medical Service, establishing a causal link between the August 1992 accident and her periods away from work, the ITU is deducting the complainant's periods of absence from her sick-leave entitlement.

Following a request from the complainant, supported by a certificate from Dr H., the defendant organisation took steps to ensure that the complainant's work space met certain requirements.

The Union points out that the compensation procedure was brought to a conclusion by the submission of the Compensation Board's report to the Secretary-General on 11 October 2000. Its findings were essentially based on the report prepared by Dr H. at the request of the complainant. The complainant did not agree with the degree of impairment calculated nor with the amount of compensation she was to be awarded. The organisation, however, cannot accept her method of calculating the degree of her impairment. It produces the report drawn up by Dr D. that was requested by the complainant.

In order to be able to respond to the complainant's allegations of psychological and professional harassment the Union commissioned a report from an independent expert, asking him to carry out a full study of the complainant's administrative situation since joining the organisation. It produces the resulting report, dated 20 September 2000, and denies that there was any harassment towards the complainant. It also took the decision to have certain investigations conducted. One was carried out by the Director of the Joint Medical Service, and it produces his statement. The ITU also sought an expert psychiatric assessment, which would be submitted to the Tribunal when available.

D. In her rejoinder the complainant contends that the organisation failed to notify her of any extension or delay in the appeal procedure; she maintains that since the Secretary-General did not send a written reply to the Appeal Board within four weeks of her filing her internal appeal she had exhausted the means of internal redress and her complaint is receivable.

On the merits, she reports that the person mandated to investigate her administrative situation unexpectedly telephoned her at home. She argues that this infringed upon her privacy and human rights. Moreover, the report he produced was based on hearsay evidence. The Administration failed to inform her of its decision to carry out the investigation and she saw a copy of the report only because the ITU produced it with its reply on her present case. It is only now that she can present her defence. The statements contained therein were libellous, defamatory and unfounded. She asks the Tribunal to provide "exemplary redress" in the form of damages. She also asks it to hear the author of the report as a witness. In forwarding the report in question directly to the Tribunal the Administration abused its power. She asks to be awarded 200,000 dollars in "punitive" damages.

She argues that a figure of 25 per cent permanent impairment of the whole person must be retained. Contrary to what the organisation affirms, it has not reimbursed all her medical expenses. Moreover, her sick-leave credit over the last four years has been exhausted because the ITU counted all of her sick leave as ordinary sick leave, and her salary has consequently been reduced by 50 per cent.

In additional claims she asks for compensation for occupational illness "as per Appendix D"; reimbursement of medical expenses and transportation costs that are pending, with interest; reinstatement of her annual leave credit and her sick-leave credit; additional salary payments – particularly to take account of her 25 per cent impairment; and an undertaking that the ITU will pay all future expenses connected with her injury.

E. Subsequent to the filing of her rejoinder the complainant received a copy of the psychiatric assessment which was produced at the ITU's request by Dr A. She has submitted a copy to the Tribunal.

F. In its letter to the Tribunal dated 9 April 2001 the Union comments on the tone adopted by the complainant in her rejoinder. The remarks made therein were "of an offensive and defamatory nature". It wishes to stress that in its own pleadings it has never expressed any preconceived judgment with regard to her state of health, having always left that up to the competence of the relevant medical specialists.

CONSIDERATIONS

1. On 24 February 2000 the complainant addressed a request to the Secretary-General of the ITU seeking redress arising from a service-incurred injury to her left foot which occurred on 20 August 1992. She did not receive a reply within the six-week period provided for in paragraph 2 b) of Staff Rule 11.1.1. This states that if no reply has been

received from the Secretary-General within six weeks of the date when the request was addressed to the Secretary-General, the staff member shall within the following six weeks submit an appeal in writing to the Chairman of the Appeal Board. The other time limits applicable under paragraph 4 of Staff Rule 11.1.1 are:

- The Chairman shall submit the appeal immediately to the Secretary-General, who shall send his reply within four weeks from the date he receives the written appeal.
- The deliberations of the Appeal Board shall begin at the latest seven weeks from the date the written appeal was submitted.
- The report of the Appeal Board shall be sent to the Secretary-General within ten weeks from the date the appeal was submitted; a copy of the report shall be transmitted immediately to the appellant.

Paragraph 5 states that the Secretary-General shall take the decision within sixty days of receiving the report.

Clause c) of Rule 11.2.1 provides that no appeal shall be made to a tribunal before the appeal procedure within the ITU, prescribed in Regulation 11.1, has been exhausted.

2. The complainant lodged two internal appeals - "appeal No. 8" on 1 May 2000 and "appeal No. 9" on 10 May 2000. She lodged a complaint with the Tribunal on 19 June 2000 challenging an implied negative decision arising from the ITU's failure to respond to the request of 24 February 2000. She claims she has exhausted the means of internal appeal because the organisation failed to reply to her appeal within the statutory time limit of four weeks.

3. The ITU submits that the complaint is premature because the Appeal Board had ten weeks from the date the appeal was lodged in which to report (until 7 July) and the Secretary-General had sixty days from the date of the report to take a final decision (until 4 September). Therefore, the complainant could not lodge a complaint with the Tribunal until after 4 September 2000.

4. The Statute of the Tribunal provides in Article VII(3):

> “Where the Administration fails to take a decision upon any claim of an official within sixty days from the notification of the claim to it, the person concerned may have recourse to the Tribunal and his complaint shall be receivable in the same manner as a complaint against a final decision. ...”

5. In the opinion of the Tribunal the complainant had exhausted the means of internal appeal under the applicable Staff Rules when the Secretary-General failed to reply within four weeks from the submission of the appeal. The Union was in breach of its own rules and precluded itself from reaching a final decision in accordance with the internal appeals procedure. The complainant was then entitled to treat the internal appeal procedure as being exhausted and to have recourse to the Tribunal as though she were challenging a final decision.

6. In her letter of 24 February 2000 the complainant claimed that, on the basis of the conclusions of Dr H. dated 8 November 1999, she was suffering a “25% impairment of a lower extremity” or a “10% loss of function of the whole body”, which she states is by a ratio of 10:40; she claims that a ratio of 10:40 is equivalent to a ratio of 25:100, and accordingly a 25 per cent impairment of the whole person must be retained.

The complainant claimed that she was compelled to work on a full-time basis under strenuous working conditions. Therefore, she worked 25 per cent more than she should have done for almost eight years and was continuing to do so. She requested that the hours worked in excess be treated as overtime. She complained that all absences at work were treated as “ordinary sick leave” whereas they should have been treated as “special sick leave”. She claimed that although she was allowed a three-week cure in 1998, she should have been allowed an annual cure for the previous six years. Dr H.'s certificate requesting proper office accommodation had been ignored and she was moved in September 1999 to shared office accommodation. She claimed that the Administration had been concerned with psychologically harassing her rather than finding a solution to her health problem, for which it is solely responsible.

She sought the following relief:

- A lump-sum benefit for partial permanent invalidity under ITU Staff Rule 6.2.4 and Appendix D to the United Nations Staff Rules, with 10 per cent compound interest from August 1992.
- Financial compensation for pain experienced and for delay in settling the case.
- Twenty-five per cent "overtime" worked from 20 August 1992 to 31 December 1996, at G.7 level, and from 1 January 1997 to date, at G.6 level, with interest at 10 per cent.
- Compensation because she cannot drive to and from the office or practise sports.
- Refund of expenses incurred in reshaping her lifestyle.
- The provision of adequate office accommodation and transport to and from work.
- A relevant job description in line with the work she was requested to perform.

7. The relief claimed in her complaint is more extensive and is as follows:

(1) Compensation for service-incurred injury sustained in 1992 within thirty days as per the rules governing compensation contained in Appendix D.

(2) Based on 25 per cent loss of function since 1992;

(3) With compound interest at 10 per cent since August 1992.

(4) A medical board convened for "her major depressive syndrome" – incurred as a result of psychological harassment at work – to determine the degree of invalidity.

(5) A partial (or full) permanent invalidity pension for "service-incurred injury and service-incurred illness".

(6) At least 25 per cent of time worked to be treated as overtime from 20 August 1992 to 31 December 1996, at G.7 level, and from

1 January 1997 to date, at G.6 level, with compound interest at 10 per cent.

(7) A reduction in working hours of at least 25 per cent.

(8) to (15) Lump-sum payments in compensation mainly for pain experienced, lack of mobility and transportation difficulties encountered since 1992.

(16) A lump sum for not having been authorised to have a three-week annual cure from 1992 to 1997 and 1999 to 2000 and reimbursement of a hotel bill dating from 1998.

(17) A three-week annual cure from 2001 onwards.

(18) Reimbursement of all pending medical expenses for service-incurred injury and illness.

(19) Compensation for delay in settling this matter.

(20) Compensation for mobbing.

(21) Administration to take steps to stop mobbing.

(22) Transfer to a different unit.

(23) A relevant and current job description.

(24) Office accommodation suitable to her handicap.

(25) Absences in connection with her injury since 1992 to be treated as "special sick leave".

(26) The ITU to confirm that Rule 6.2.2 applies to all staff and/or that the complainant is an exception to that rule.

(27) The ITU to bear the costs of repeated consultations with specialists during each absence in connection with her service-incurred injury.

(28) The ITU to provide details of sums paid by the Vaudoise insurance company since 1992 concerning her injury and confirm that no award of compensation has been paid to a third party and/or is owed to her.

(29) A copy of Dr D.'s report to be made available and a medical board to be convened should his report not be congruent with the others.

(30) In the event that the Tribunal decides it is not competent in this case, to order the ad hoc Compensation Board to issue an opinion on:

- (a) Dr H.'s report concerning her foot condition.
- (b) Her major depressive syndrome.
- (c) Reduction in working hours.
- (d) Special sick leave entitlement.
- (e) Hours "worked in excess of degree of invalidity", as well as the fact that she is required to see a specialist in order to obtain a medical certificate.

(31) A lump sum for costs.

8. The complainant lodged two appeals with the Appeal Board. Appeal No. 8 concerned the absence of a decision to determine what compensation was due for her service-incurred injury. The complainant listed twenty items of relief similar to those claimed in her complaint. But it is only the items claimed in her letter of 24 February 2000 that are receivable. In appeal No. 9 she raised a question of whether absences in connection with her injury should be treated as "special sick leave". She also raised the question of why the Compensation Board, authorised on 6 March 2000, had not yet met. She referred to her letter of 3 April 2000 to the Secretary-General contesting the Administration's decision to treat absence from 25 February 2000 as ordinary sick leave.

She sought eight items of relief which are also claimed in this complaint. But this complaint consists only of an appeal against an implied rejection of the claims contained in the letter of 24 February 2000.

9. In order to deal with this matter it is necessary to consider the history of the complainant's dealings with the ITU. On 20 August 1992 the complainant suffered an accident at the ITU and on 18 September an accident report was sent to the *Vaudoise* insurance company. She had an operation on 4 December 1992. Her own surgeon certified on 21 December 1993 that she was incapacitated for work at 100 per cent from 3 December 1992 to 2 February 1993 and at 50 per cent from

3 February 1993 to 9 February 1993 and noted that she resumed full-time work on 10 February 1993. Her surgeon said that on 8 November 1993 her condition did not give rise for concern and the patient was not in pain. Between 10 February 1993 and 1997 all invoices submitted by the complainant relating to the accident were accepted by the insurance company for reimbursement or direct settlement.

10. On 10 March 1997 the complainant contacted the insurance company to request an expert examination to "determine the consequences" of the accident. The insurance company replied that the medical information available to it made it clear that there was an absence of causality between the injury suffered in August 1992 and her current medical problems. If she did not agree she could obtain a medical opinion at her expense. Correspondence ensued and the complainant did obtain medical opinions. The insurance company then wrote to the complainant on 28 August 1997 to say that insurance coverage for the accident was limited to five years from the date it occurred.

11. Having been informed of this by the complainant, the ITU asked for her medical records - for submission to its Medical Adviser. The organisation sought and obtained legal advice. On the strength of that advice, it told the complainant, on 13 February 1998, that it would pay 100 per cent of the hospitalisation costs for another operation linked to her accident.

12. In July 1998 she went on a cure, but did not stay the full course. She then informed the Administration on 19 August 1998 that she had decided not to undergo the second operation and had been advised instead to go for a thermal cure. She also asked for reimbursement of her expenses.

13. On 28 August 1998 the ITU noted the fact that she had decided not to have the operation and informed her that the expenses of the cure she had been on were accepted only on the recommendation of the Medical Adviser. The organisation would also pay the cost of consultations at

Lausanne and at Dracy-le-Fort (in France) even though not previously agreed. However, it would not pay the expenses of a taxi (1,000 Swiss francs) to Dracy-le-Fort, the reason being that the journey was undertaken without the Medical Adviser's prior approval and it was not the nearest place where suitable treatment was available. The Union considered that new circumstances were created by her decision not to have a second operation; consequently, another opinion from the Medical Adviser was necessary in order to decide what should be done for the future.

14. The Director of the Joint Medical Service reported to the ITU on 22 January 1999 that the functional and physical symptoms of the complainant's left foot undoubtedly resulted from the 1992 accident and advised that it was premature to think of a surgical intervention and that only medical treatment was deemed necessary.

15. On 21 April 1999 the ITU requested the Joint Medical Service to arrange for a specialist examination to establish the degree of invalidity suffered by the complainant.

16. The complainant was absent on certified sick leave from 26 April to 2 June 1999.

17. Dr D., a foot specialist at the Orthopaedic Clinic of the Cantonal Hospital in Geneva, was asked to carry out the required examination. In a letter of 31 May 1999, the ITU's Medical Adviser asked him to give an opinion as to what was, and what was not, directly related to the 1992 accident; estimate the loss of function according to "The Guides to the Evaluation of Permanent Impairment"; state whether the complainant's absence from 26 April to 2 June 1999 was directly related to the accident; propose a treatment; and give a prognosis.

18. Dr D. carried out the examination on 2 June 1999 and recommended that a bone scan be taken, which the complainant refused to have. He wrote to the complainant on 11 June 1999 explaining why it was necessary.

19. The complainant obtained a certificate on 6 September 1999 from Dr H. stipulating that her work environment should be adapted to take account of her state of health. She asked for a separate office which the ITU refused to grant as it was not required according to the certificate. Her work area was inspected by the Medical Adviser who, on 22 September 1999, approved it as being in accordance with the medical requirements in Dr H.'s certificate but said she should have an adjustable stool.

20. On 8 November 1999 Dr H. produced a report. He said that the injury to the left foot had resulted in post traumatic arthritis. He estimated the loss of function of the left foot at 25 per cent which corresponded to a 10 per cent impairment of the whole person. He confirmed that her incapacity for work from 26 April to 2 June 1999 was directly related to the accident. He said there was no radical treatment which could remove the sequelae of the accident. He recommended physiotherapy by means of a three-week annual thermal cure.

21. On 6 March 2000 the complainant was informed that a Compensation Board was being set up and she was asked to choose her representative. On 9 March she appointed Mr C.

22. The complainant submitted a medical certificate for sick leave from 25 February to 10 March, and a second one for an extension up to 24 March 2000.

She was informed by the ITU on 23 March that any future sick leave she would ask for in relation to her accident should be supported by a medical certificate accompanied by a full detailed report from a medical specialist; failing that, such periods would be treated as ordinary sick leave.

On 27 March 2000 the ITU told her that she had not provided proper justification for her absence from 25 February to 24 March 2000. She was informed that unless the Medical Adviser advised to the contrary, her sick leave would be treated as ordinary sick leave.

23. On 3 April 2000 the complainant wrote a letter to the Secretary-General which formed the basis of appeal No. 9, asking why the Compensation Board had not met and asking for a Medical Board to be convened. She contested the decision to treat her absence from 25 February as ordinary sick leave.

24. The Secretary-General replied on 28 April 2000 to the two letters dated 24 February and 3 April. He said that he had instructed the Compensation Board to provide advice and that the complainant's request for a medical board was premature. When he received the Board's recommendation he would take a decision; she should await that decision before requesting the convening of a medical board. He confirmed that for any future absences which she claims are related to the accident she would be required to produce a report from a specialist. The Compensation Board had to report on the degree of disability established and it still had to be decided whether her disability had resulted in a reduction of her working capacity.

25. The Compensation Board met on 28 June, 6 July and 7 September 2000. It considered the report of Dr H. dated 8 November 1999 and one from Dr D., dated 9 June 2000. Dr D. had re-examined the complainant on 19 May 2000. He estimated the loss of function for the left foot at 10 per cent which represented a 4 per cent impairment of the whole person.

26. In its report on 10 October 2000 the Compensation Board found: (1) that the complainant was entitled to compensation; (2) that her impairment had not resulted in a total incapacity for work; and (3) that her working environment ought to be adapted to take account of her mobility problems. It unanimously concluded, based on Dr H.'s report, that the complainant had a loss of function of the left foot of 25 per cent which corresponded to a 10 per cent impairment of the whole person. Applying the method of calculation in force within the United Nations common system the Board concluded (by a majority) that the complainant should be

awarded 15,714.80 United States dollars. Her representative did not agree with the amount as it did not correspond to the complainant's expectation as to the level of damages.

27. The Secretary-General informed the complainant by letter dated 26 October 2000 of the Board's conclusions. He commented that the process had been delayed because the Board was waiting for the results of an examination requested by the Medical Adviser. He told her that he fully endorsed the conclusions of the Compensation Board and that she would be paid a lump sum of 15,714.80 dollars.

28. To revert to the claims made in the letter of 24 February 2000, the complainant's claim that in calculating the lump-sum benefit for her service-incurred injury she must be treated as having 25 per cent impairment of the whole person, is unsustainable. The unanimous conclusion of the Compensation Board, based on her own doctor's report that she suffered 25 per cent loss of function of the left foot corresponding to a 10 per cent impairment of the whole person, was made according to the rules laid down in the "Guides to the Evaluation of Permanent Impairment" drawn up by the American Medical Association, the use of which is part of the procedure in force within the United Nations common system.

The complainant's claim for "a lump sum benefit" has been met by the decision of the Secretary-General made on 26 October 2000 endorsing the conclusions of the Compensation Board to award her 15,714.80 dollars. If the complainant was dissatisfied with the award as not being adequate to compensate her for claims (1), (2), (4), (5) and (6), which are set out above at 7, she should have pursued the appropriate procedures for internal appeal as provided in the Staff Rules and Regulations.

29. She argues that since she had a 25 per cent impairment of the whole person it means she was forced to work 25 per cent more than she should have done; but her plea is without foundation. She did not have a

25 per cent impairment of the whole person. Even if her argument is applied to the 10 per cent impairment of the whole person as recognised by the Compensation Board, her capacity to perform her duties adequately had not been impaired.

30. Her office accommodation which she complains about, was inspected by the Medical Adviser on 22 September 1999 and was found to be adequate to her medical needs, provided she was also given an adjustable stool. The Secretary-General on 26 October 2000 informed the complainant that he endorsed the conclusions of the Compensation Board, which found that her working environment ought to be adapted to take account of her mobility problems. However, the complainant does not specify how her working environment is inadequate. In the absence of any details, the Tribunal cannot take up this claim.

31. Lastly, the complainant looks for a relevant job description. This has been dealt with in Judgments 1976 and 2026 on her first and second complaints both of which refer to an official job description established in June 1999. The complainant has not proved that there has been any change; therefore, nothing further arises.

32. The Tribunal dismisses all claims.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 27 April 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL
GENEVA

NINETY-FIRST SESSION

***In re* Grover** **Judgment No. 2071**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Vinod Grover against the International Labour Organization (ILO) on 20 October 2000, the ILO's reply of 19 January 2001, the complainant's rejoinder of 15 February, and the Organization's surrejoinder of 30 March 2001;

Considering Articles II, paragraph 1, and VII, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Indian national born in 1954, joined the International Labour Office, the ILO's secretariat, in 1980 as a Finance Assistant at grade L.5 in the General Service category in the ILO Area Office at New Delhi. He received several promotions and special merit increments and from 1984 to1993 he occupied the post of Senior Finance, Personnel and Administration Officer. In the latter half of the 1980s he reached the level of Senior Programme Administrator Support Officer (SPASO), a grade which is between the General Service and Professional categories.

Up until 1989 his performance appraisal report acknowledged his professional competence, but after that time the complainant's responsible chief, in particular, found his work to be lacking in certain respects. A fact-finding mission took place in November 1991 to investigate allegations made against the complainant. On 5 November 1993 the Director of the Personnel Department informed him that no evidence of fraud or dishonesty had been found; however, some shortcomings in the way that he performed his duties had been noted as well as a lack of confidence in him by his responsible chief and other senior officials in the Region. As a result the complainant was transferred, with effect from 1 December 1993, to the position of Programming Officer (Monitoring and Evaluation) at the New Delhi Area Office. He retained the same grade. His work was described as satisfactory in that position, but in April 1996, because of the financial crisis affecting the ILO at that time and the establishment of a new policy, it was necessary to transfer him to the post of Senior Programming Officer in the South Asia Multidisciplinary Advisory Team which was also based in New Delhi. The complainant's work performance in this post began satisfactorily but then started to deteriorate in 1997. His supervisor gave him repeated warnings, in particular about punctuality.

In the meantime, the complainant was considered for an appointment without limit of time ("titularization") in early 1993. However, the Administrative Committee felt it necessary to have the conclusions of the fact-finding mission before making a decision and consideration of the matter was postponed. Again, in 1997 he was to be considered for "titularization". However, the Committee lacked a recent performance appraisal report on the complainant and his appraisal report for 1995-1996 had not yet been established. At its meeting in April 1997, therefore, it called for an ad hoc performance appraisal report to be completed on the complainant. This, however, was not done at the time. Due to increasing concerns about the quality of the complainant's work, on 10 October 1997 the complainant's responsible chief sent him a minute informing him that an ad hoc appraisal would be produced to evaluate his performance for the period from January 1997 to May 1998. He was also informed that his contract, which was expiring at the end of 1997, would be extended for only one year, instead of the normal two years, and that any future extensions would depend on the results of the appraisal. In this appraisal, prepared by the responsible chief in August 1998, the complainant's performance was characterised as "less than satisfactory". It was noted that his professional strengths lay in administrative and financial matters and that he would need to "adapt and re-orient himself" in order to perform well as a programming officer.

Relying on observations made by the complainant and the result of the ad hoc performance appraisal, on 12 May 1999 the Reports Board concluded that the complainant "had not fulfilled the requirements of a Senior Programming Officer" and recommended to the Director-General that his contract not be renewed upon its expiration in July 1999. On 14 July 1999 the Chief of the Personnel Planning and Career Development Branch informed the complainant, on the Director-General's behalf, that his contract would not be renewed. It was nevertheless extended for one month, until 31 August 1999, in order for him to complete any outstanding assignments. He was also informed that he would be paid an indemnity equivalent to six months' salary – calculated using the table included in Article 11.4 of the Staff Regulations – and that the Organization would pay for him to consult with a career counsellor.

By a letter dated 2 August 1999 the complainant appealed to the Director-General against the decision not to renew his contract. His appeal was treated as an internal complaint under Article 13.2 of the Staff Regulations. In March 2000 the Director-General referred the internal complaint to a Joint Committee, the composition of which is fixed by Article 10.5 of the Staff Regulations.

The Committee conducted oral hearings in the Regional Office for Asia and the Pacific, in Bangkok. In its report dated 14 July 2000 it considered that the complainant "had a reasonable expectation of becoming titularized after 1993" and found procedural flaws in the "titularization" exercise as well as the launching of the ad hoc performance appraisal by his responsible chief. It noted a marked deterioration in the appreciation of the complainant's performance from 1997 onwards but that the management style of the complainant's responsible chief might have contributed somewhat to such a deterioration. It did not find evidence of a pattern of bias on the part of the Personnel Department or other senior managers involved in the case. The treatment the complainant received was not deemed unjustified. Despite these facts, it unanimously recommended not to reinstate the complainant. It found that he was "entitled to an amount of US$135,000, which takes into account the payment already received by him upon dismissal". Regarding a claim to costs it was of the opinion that the expenses incurred by the complainant since his "dismissal" had "been covered adequately by the Office", but recommended paying a lump sum of 2,000 dollars to the medical practitioner who accompanied the complainant to the Joint Committee hearings in Bangkok.

By a letter of 31 August 2000 the Director of the Office of the Director-General informed the complainant that the Director-General had decided to maintain his decision not to renew his contract with the following modifications: the complainant would be given retroactively a one-year extension of contract (until 31 August 2000) entitling him to the salary and all benefits he would have received if he had continued with the Organization until that date. He would also be paid 30,000 United States dollars in compensation for administrative mistakes made by the Organization and, in accordance with the Joint Committee's recommendation, 2,000 dollars in costs. The separation indemnity that he was awarded in 1999 was maintained. That is the impugned decision.

B. The complainant argues, first, that the Director-General's decision demonstrated an abuse of power in that he did not accept all the Joint Committee's recommendations, which was tantamount to altering its report. It also shows partiality in that by referring the matter to the Joint Committee the Director-General created a legitimate expectation that the Committee's recommendations would be observed. He contends that "[i]n no other instance in which a matter has been referred to a Joint Committee in terms of Article 13.2 of the Staff Regulations has its conclusions not been followed". Furthermore, the complainant's one-year extension of contract is not valid as it was made unilaterally by the Director-General without seeking the complainant's agreement.

There were also procedural flaws that resulted in the infringement of his rights. By referring his case to a Joint Committee the ILO prevented the complainant from filing a complaint with the Tribunal as he had no final decision that he could impugn. Referral to the Joint Committee also offended against the Staff Regulations inasmuch as Article 13.2 allows such a procedure for officials in service only and not for former officials, as the complainant then was. Therefore, it was inappropriate to continue the procedure once his contract ended. He suffered material injury because he had to wait before he could submit his complaint to the Tribunal.

Secondly, the complainant claims that the process whereby he was considered for "titularization" was "unfair, improper and damaging", and that his status as a result of this was adversely affected and contributed to the unjustified termination of his contract. He was up for consideration twice, but due to delays and other administrative matters the process was not concluded.

Thirdly, he argues that the termination of his employment was procedurally and substantively unfair and flawed. The relevant procedures for termination of fixed-term appointments and termination for unsatisfactory services, as set out in Articles 11.4 and 11.8 of the Staff Regulations, were not applied. He impugns the termination "in substance".

The complainant seeks: the quashing of the "challenged decisions", reinstatement, and restoration of his rights and entitlements in respect of "titularization"; alternatively, he requests compensation in respect of loss of earnings and benefits from the time of his separation up to the age of retirement, and for loss of pension entitlements thereafter. He claims damages for "material injury suffered" under two heads: as a result of medical treatment that became necessary and "losses resulting from the unconscionable delays" that prevented him from presenting his complaint before the Tribunal. He also claims: moral damages; punitive damages for defamation of character by ILO officials; and costs for his present complaint as well as for legal representation in the Joint Committee proceedings.

C. In its reply the ILO asserts that its concern was to respect the complainant's rights at all times: it was for this reason that his case was referred to a Joint Committee. The Director-General endorsed the Committee's recommendations except those that were based on "a manifestly erroneous assumption concerning titularization". It points out that the complainant's contract was not renewed; nonetheless, the Organization allowed him to benefit from the procedural safeguards which apply in cases of termination for unsatisfactory performance under Article 11.4 and granted him the discretionary termination indemnity provided for therein.

It had been explained to the complainant that former officials are not barred from lodging internal complaints under Article 13.2. If the complainant truly believed that the referral to the Joint Committee was not proper after he was no longer a staff member then he should have lodged a complaint with the Tribunal as an alternative measure. In his appeal to the Director-General dated 2 August 1999 the complainant had written: "for consideration or reference to the Joint Committee". The Organization considers that it would have been irresponsible in this case for the Director-General to take a final decision without referring it to a Joint Committee; not only was it appropriate in view of the complainant's length of service with the ILO but it corresponded to his own wishes at the time.

Although the complainant might not have been satisfied with the manner in which certain aspects of his internal complaint were handled, the Organization asserts that nevertheless the relevant rules and procedures of the ILO were followed and his rights were properly respected. If he considers that there was a violation of due process then he must provide concrete examples of the violation. The Organization states that the Committee's report was an adequate basis for the Director-General's final decision and that the report was transmitted to the complainant without "alterations" in the way he infers. It says that the Director-General holds the recommendations of the Joint Committee in the highest regard, but its role is only advisory. Therefore, the Director-General was correct to accept the recommendations that were based on fact and reject in part those based on erroneous assumptions. For example, as a result of the findings in the Committee's report the Director-General learned that the complainant's responsible chief might have been partly responsible for the situation; that was one reason why he granted the complainant a one-year retroactive extension of contract. The Director-General disagreed, however, with the finding that the complainant "had a reasonable expectation of becoming titularized after 1993". The Committee overlooked the fact that the complainant did not fulfil all four of the conditions on for "titularization" set out in circular 452, series 6; so he could have had no "reasonable expectation".

The ILO submits that the complainant had been given adequate warning that his performance needed improvement and that failure to improve would result in the non-renewal of his contract. Rather than show a willingness to improve, he adopted an attitude of confrontation. It asserts that the decision not to renew his contract was taken in line with the Tribunal's case law; as a discretionary decision, it can only be set aside under certain conditions, none of which apply in this case.

Lastly, the Organization notes that one of the complainant's claims to material damages relates to what he characterises as "unconscionable delays and unjust restrictions" preventing him from coming to the Tribunal. It points out that it took less than thirteen months from the time the internal complaint was lodged to convene the Joint Committee – away from headquarters – hold hearings, and come to a final decision. In its view this accusation is exaggerated. The claims for material and punitive damages, and the cost for representation before the Joint Committee have never been presented to the Organization and are therefore irreceivable for failure to exhaust all internal remedies.

D. In his rejoinder the complainant contests the ILO's assertion that it was correct to continue the internal complaint procedure under Article 13.2 and maintains that he should have been allowed to appeal directly to the Tribunal when his contract ended. He says that the ILO "compounds the confusion between an appeal in terms of Article 11.8 and a referral under Article 13.2".

The complainant submits that correspondence to him contained misleading information as regards the procedure to be followed. When he tried to lodge an appeal to the Joint Committee in terms of Article 11.8 of the Staff Regulations he was informed by the Personnel Department that he was not entitled to do so. Therefore, he says, his right to appeal to the Committee directly was not guaranteed, as his case was referred to it by the Director-General under Article 13.2.

He takes issue with the fact that the Organization tried to continue to treat him like a staff member by allowing the Joint Committee proceedings to go forward while at the same time denying him all privileges and benefits of being an official, as he was no longer paid a salary. He also contends that termination of contract is not the same as non-renewal.

The complainant asserts that as far as the rules of procedure for the Joint Committee hearing are concerned, the Committee failed to observe these rules until his representative prevailed upon it to do so.

He reiterates that the Director-General's unilateral retroactive renewal of his contract was illegal and presses his plea regarding the non-observance of the Joint Committee's recommendations. He denies having adopted a confrontational attitude and says that he was not given "a clear warning of non-renewal" as required by the Staff Regulations.

Taking up the matter of costs for representation before the Joint Committee he says that a request was made to the Organization. It was submitted immediately after the hearings.

E. In its surrejoinder the ILO maintains that the decision impugned was based on the recommendations of the Joint Committee, but that the latter drew "a clearly mistaken conclusion ... from the facts" which in turn played a role in the recommendations. For that reason, not all of the Committee's recommendations were endorsed by the Director-General.

It presses its argument that, under the relevant staff rules, it was correct to allow the internal complaint procedure to continue even after the complainant's contract ended and reiterates that it was the complainant who raised the question of referring his case to the Joint Committee. The Director-General's decision to grant the complainant a one year's retroactive extension of contract is not illegal. Final decisions of this kind are taken without consulting a complainant. In addition, the ILO points out that such decisions are to a complainant's advantage as the benefits are immediately received without prejudice to any right to contest the decision before the Tribunal.

As far as the reasonableness of the compensation awarded by the impugned decision, the Organization submits that the termination of the complainant's appointment was not illegal; it had the right not to renew his contract. The complainant had been warned that his performance was lacking. It also contends that he has been adequately compensated for the non-renewal of his contract.

CONSIDERATIONS

1. The complainant joined the staff of the ILO in 1980 in the ILO Area Office in New Delhi. He was informed on 14 July 1999 that his contract would not be renewed upon its expiration; he appealed against this decision to the Director-General. Unsatisfied with the Director-General's final decision, he has filed this complaint with the Tribunal.

2. The decision not to renew the complainant's contract was based on the recommendation dated 12 May 1999 of the Reports Board, which in turn had relied in part on the ad hoc performance appraisal report ordered by the complainant's responsible chief in October 1997 following concerns about the complainant's performance. A fact-finding mission sent to the New Delhi Area Office in 1991 revealed that there were shortcomings in his performance and that his chief and other senior officials lacked confidence in him. As a result, he was transferred in 1993 to the position of Programming Officer at the Area Office. In 1996 he was transferred to the South Asia Multidisciplinary Advisory Team. After receiving notification of his non-renewal, he sent an appeal to the Director-General on 2 August 1999 stating that it was "for consideration or reference to the Joint Committee" but without prejudice to his right to appeal the decision to the Administrative Tribunal. It was treated as an internal complaint pursuant to Article 13.2. That article reads:

> "Any complaint by an official that he has been treated inconsistently with the provisions of these Regulations, or with the terms of his contract of employment, or that he has been subjected to unjustifiable or unfair treatment by a superior official shall, except as may be otherwise provided in these Regulations, be addressed to the Director-General through the official's responsible chief and through the Personnel Department, within six months of the treatment complained of. The Director-General may refer any such complaint to the Joint Committee for observations and report."

3. It is clear from the above-cited provision – from the use of the word "shall" – that the complainant had no choice but to address his complaint to the Director-General before coming to the Tribunal. Had the

complainant's contract been terminated prior to its expiry on the grounds of unsatisfactory services, he would have had the right to appeal directly to a Joint Committee pursuant to Articles 11.4 and 11.8 of the Staff Regulations and other statutory procedural safeguards would have been applicable, but this was not the case here. The Director-General nonetheless exercised his discretion under Article 13.2 to refer the matter to the Joint Committee.

4. The complainant seeks to draw some argument from the fact that by the time the Director-General exercised his discretion to refer the matter to the Joint Committee, the complainant's contract had already expired. The argument is not only without merit, but it cannot possibly benefit the complainant. In the first place, it cannot be assumed that the fact that the non-renewal actually took effect means the Director-General's decision of 14 July 1999 had become final. If that were the case, the complainant would now have no available remedy against that decision, since he did not file any appeal of that decision directly before the Tribunal. Likewise, the fact that the matter was referred to the Joint Committee even though the contract had already expired clearly indicates that the Director-General's decision was subject to being revised following the recommendation of the Joint Committee, as in fact it was. If the right of appeal created by Article 13.2 is to have any meaning it clearly implies that the Organization's decision may be altered as a result of such appeal and it is simply incoherent for the complainant to argue otherwise.

5. Contrary to the complainant's assertions, nothing in the relevant provisions suggests that the Joint Committee had the power to issue recommendations binding on the Director-General. In fact, paragraph 13(b) of Part B of Annex IV (which deals with the procedure of the Joint Committee) of the Staff Regulations clearly indicates that the Director-General merely has to give consideration to the Joint Committee's findings:

> "The Committee shall hear first the complainant and then the superior official concerned; both may be accompanied by another official if they so desire. The Committee may then proceed to such other hearings and inquiries as it may deem necessary. It shall forward its conclusions and the reasons therefor to the Director-General, who, after considering the conclusions of the Committee, shall communicate his decision, with a statement of the reasons for it, to the complainant and to the superior official concerned."

6. Thus, the final decision is really the decision of the Director-General that was communicated to the complainant on 31 August 2000, after consideration of the Joint Committee's findings. Such a discretionary decision is subject to limited grounds of review. According to the Tribunal in Judgment 1262, *(in re* Scherer Saavedra):

> "The case law has made it consistently plain that a decision not to renew a fixed-term appointment, being discretionary, may be set aside only if it was taken without authority, or in breach of a rule of form or of procedure, or was based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was abuse of authority. Moreover, when the reason given for non-renewal is unsatisfactory performance the Tribunal will not replace the organisation's assessment of the complainant's fitness for his duties with its own."

7. Likewise, in Judgment 628, (*in re* Lingham), the Tribunal held that:

> "The Director-General has a duty to ensure that the Organisation is efficiently run. If in seeking to preserve efficiency he exercises his discretion not to renew a contract, it must be taken, unless the contrary is proved, that he is acting in the best interests of the Organisation. Such a decision will not be reviewed by the Tribunal unless it is shown to be flawed by lack or absence of authority, the violation of a procedural rule, a basic error of fact or of law, or a clearly mistaken conclusion drawn from the dossier."

8. The complainant's criticisms fall under two categories which will be used to address the two following questions: Was the confirmation of the decision not to renew justified? Are there grounds for interfering with the amount of the compensation awarded to the complainant?

The confirmation of the decision not to renew

9. The Director-General's decision of 31 August 2000 regarding non-renewal was based partly on the conclusions of the Reports Board and of the Joint Committee. In May 1999 the Reports Board based its conclusions largely, but not solely, on the ad hoc performance appraisal requested by the complainant's responsible chief. The complainant has contested the fairness and legality of such an ad hoc appraisal. The Joint Committee judged that the launching of the performance appraisal was procedurally flawed in several respects. The Administrative Committee,

responsible for making recommendations on "titularization" to the Director-General, endorsed a recommendation by its working group to request an ad hoc performance appraisal report. The working group's recommendation was erroneously dated 29 April 1997, one day after the date it was endorsed by the Administrative Committee. The Joint Committee did not believe the Organization's explanations for the discrepancy although it appears to the Tribunal to be nothing more serious than a clerical error.

10. The complainant also alleges bias on the part of the Chairperson of the Administrative Committee and believes that misleading statements contained in a document headed "Brief regarding New Delhi matters", improperly influenced the decision as to whether he should be given an appointment without limit of time. There is, however, no evidence that that Brief was ever presented before the Administrative Committee. As for the Chairperson, he was not the one who had decided that the complainant could no longer be trusted with administrative and financial responsibilities. That decision was taken by the Director of the Personnel Department. Furthermore, pursuant to Article 10.2(b) of the Staff Regulations, the Chairperson has no vote except on questions of procedure. Lastly, there is no evidence that the Chairperson in this case was partial or that he had sought to influence the Committee.

11. In any event, no further action was taken pursuant to the recommendation of the Administrative Committee to establish an ad hoc performance appraisal report until 10 October 1997. At that date, the complainant's responsible chief advised the complainant of his decision to establish an ad hoc performance appraisal report and at the same time, advised him that his contract would only be renewed for one year, instead of the usual two years. Any further renewal would depend on the result of the performance appraisal. The Joint Committee noted that while the Administration believed that the two ad hoc performance appraisals had become merged into one, the complainant received a misleading fax dated 22 January 1998 and was not notified of this "merger" until very much later. The Joint Committee wrote that it "could understand [the complainant's] strong reaction to his responsible Chief's notification of a second ad hoc performance appraisal at a time when he had reason to believe that he could

be titularized". The Joint Committee in fact found that the complainant "had a reasonable expectation of becoming titularized after 1993, and this not only on grounds of seniority". The Joint Committee assumed that the complainant's performance appraisal report for 1995-1996 would have been "a perfectly adequate basis for judging whether or not to titularize him" and noted that while it was issued on 11 July 1996, its completion was unduly delayed until 1998. It is plain that this delay was caused by the mix-up pertaining to the ad hoc appraisal.

12. The defendant Organization took issue with the finding of the Joint Committee with respect to "titularization" and accordingly the Director-General disregarded some of the conclusions of the Joint Committee. This is why the (discretionary) amount of compensation to be awarded to the complainant was reduced from 135,000 dollars to 30,000 dollars. Under paragraph 7 of circular 452, of series 6, four conditions must be met in order for an official to be considered by the Administrative Committee for "titularization". While the complainant clearly met the seniority criterion (at least five years of service), it is not at all certain that he met the three others which are: (1) "good conduct", (2) "satisfactory performance as consistently reflected in several performance appraisal reports" and (3) "capacity to pursue a career having regard to his/her field of competence and the prospective needs of the Organization".

13. Contrary to what the Joint Committee seems to have believed, the condition relating to satisfactory performance does not appear to have been met by the complainant, since the 1991 fact-finding mission uncovered some shortcomings with respect to the way in which he had performed his duties over the years. Furthermore, the complainant's field of competence lay in the financial and the administrative sphere. But he was removed from such duties in 1993 because of the Organization's lack of confidence in his fitness to hold a position "in which trustworthiness, discretion and the ability to form good working relationships at all levels are of paramount importance". The Organization is right to assert that "[u]ntil the complainant had been favourably appraised in another field of competence – which the transfer gave him an opportunity to be – or had reestablished confidence in his fitness to resume his initial field of competence, he could have no

reasonable expectation of titularization". The complainant never lodged an appeal against the decision to transfer him.

14. In the Tribunal's view, the procedural flaws that have occurred cannot be construed as vitiating the final decision. The conclusion of the Reports Board in its report of 12 May 1999 was based largely on the ad hoc performance appraisal but also on other evidence. It reads as follows:

> "The Reports Board considered that [the complainant] had not fulfilled the requirements of a Senior Programming Officer. In particular, his attitude has affected his performance. The Board considered that he had received all help from his responsible chief had he wished to attain the required standard. There was evidence that [he] had received adequate warning of the concerns, of the establishment of the performance appraisal process; and of the reasons for it, he had also been given opportunities to express his views and improve his performance, including advice as to what was required of him. [His] unfortunate attitude to his work and towards [his responsible chief] impaired his performance to such an extent that it was impossible for the Reports Board to believe that there had been any improvement in the period under review or that any improvement was likely in the future. The Board considered that the voluminous papers gathered on this file illustrated that [the complainant] was incapable of accepting instruction in his work, let alone criticism of his performance, without creating an adversarial atmosphere between him and his responsible chief that unavoidably became disruptive. The principles of loyalty and respect for hierarchy are fundamental to the good functioning of the international civil service. This, of course, does not exclude legitimate and legal challenges where sufficient grounds exist, but in the current case, none does."

15. In addition to the views expressed in the ad hoc performance appraisal report, some evidence of the complainant's shortcomings existed and was also considered by the Reports Board. It follows that the Director-General was entitled to rely on the recommendation of the Reports Board. This was confirmed by the Joint Committee. To the extent the Director-General did not agree with the findings of the Joint Committee, the least that can be said is that there was material in the dossier which supported the view that he took.

16. The complainant also attacks the fairness of the procedure followed before the Joint Committee. In his opinion, the procedure was established without consulting him and the Committee approached his witnesses without his knowledge and before he had a chance to do so himself. This contention is devoid of merit. There is ample evidence on the

file that the complainant had every opportunity to present his objections and observations on the procedure that was to be followed by the Joint Committee.

17. In conclusion, and notwithstanding some relatively minor procedural irregularities, the Director-General did not err in exercising his discretion not to renew the complainant's contract. There was no evidence of abuse of authority or of a pattern or practice of bias on the part of the Personnel Department or other senior managers involved in the case. The transfer of the complainant to another post in 1993 was a supportive rather than a punitive career move. The Tribunal has no grounds to intervene on this aspect of the decision.

The compensation awarded to the complainant

18. In the letter of 14 July 1999 the Chief of the Personnel Planning and Career Development Branch informed the complainant, on the Director-General's behalf, that his contract would not be renewed, that he would benefit from a one-month's extension as a "notice period", and that the Organization would pay for him to consult with a career counsellor. The letter also stated that, considering the complainant's long service with the ILO, it was appropriate to pay an indemnity of an amount equivalent to six months' salary. The letter mentioned that the indemnity and the notice had been calculated according to the table included in Article 11.4 of the Staff Regulations. Some confusion might have been caused by this latter statement. While the indemnity initially awarded was calculated according to guidelines applicable in cases of termination of employment, it is quite clear in the letter that what was being considered here was non-renewal of the expired contract.

19. Once the Joint Committee released its report, the Director-General, in his discretion, saw fit to change the terms of the compensation, taking into account the recommendations of the Committee. The Committee had recommended that the complainant should be paid "an amount of US$135,000 [in moral damages], which takes into account the payment

already received by him upon dismissal". As regards costs, the Committee was of the view that the expenses incurred by the complainant since non-renewal had adequately been covered by the ILO, but recommended that a one-time payment of 2,000 dollars be made to cover the costs of the complainant's doctor who accompanied him to the hearings in Bangkok.

20. The Director-General, in his discretion, maintained his decision to grant the complainant an indemnity equivalent to the maximum amount provided under Article 11.4 of the Staff Regulations in the event of termination for unsatisfactory services. The Director-General accepted the Committee's recommendation to grant 2,000 dollars in costs.

He also agreed to award the complainant a further sum of 30,000 dollars to take account of the possibility, uncovered by the Joint Committee, that the complainant's unsatisfactory professional conduct could, to some extent, have been prompted by mistakes or misleading communications made in his respect. The complainant believes he was entitled to a larger amount. It is to be noted that, as discussed above, the Director-General was not bound by the Joint Committee's recommendation.

21. The complainant has not shown that the Director-General's decision is flawed. The assumption of the Committee regarding "titularization" must have played a significant role in its conclusion that the complainant was entitled to as large an amount as 135,000 dollars in moral damages. Considering the Director- General's view that the Joint Committee had erred with respect to "titularization", a view with which the Tribunal can find no ground for interfering, it was well within his discretion to allow payment to the complainant of a sum of 30,000 dollars, representing more than one year's salary, to compensate for the fact that the complainant's responsible chief might have been partly responsible for the situation.

22. As an additional compensatory measure, the Director- General retroactively allowed the complainant's contract of employment to continue for a further year until 31 August 2000, so that the complainant was paid the salary and other entitlements that he would have received, "had the Director-General allowed the case to be reviewed by the Joint Committee before taking a final decision on [the complainant's] employment with the

Office". The complainant argued that the Director-General could not retroactively extend his contract without seeking the complainant's assent, since fundamental contract law applies to employment contracts. It is impossible to see on what basis this aspect of the impugned decision can give rise to any grievance on the complainant's part. It resulted in his being paid a year's salary and benefits to which he would not otherwise have been entitled and for which he did no work. In effect it amounts to additional compensation being paid to him and has the result of bringing the ultimate award closer to the amount which had been recommended by the Joint Committee.

23. There remain a number of aspects of his claims for redress which are clearly irreceivable. He refers to medical treatment undergone allegedly as a result of strain and stress, but no related claim has ever been presented to the Organization. Thus, his claim to material damages for health reasons is irreceivable. The same goes for his claim for punitive damages in respect of defamation of character which has never been presented.

24. The complainant requests costs incurred in presenting the complaint and the costs associated with his representation at the hearing of the Joint Committee. It is to be noted that the Committee was of the view that the expenses incurred by the complainant had been adequately covered by the ILO, but recommended the payment of 2,000 dollars to cover the costs for the complainant's doctor. No request was ever made to cover the additional costs now being demanded. While the complainant refers to a letter from the Director of the Human Resources Development Department in which it is stated that some of the costs associated with the complainant's representation before the Joint Committee will be covered by the Organization, there is nothing in this letter indicating that the actual fees of the representative (amounting to 13,000 dollars) would be covered.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 27 April 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

James

JAMES K. HUGESSEN

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL
GENEVA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative

NINETY-FIRST SESSION

***In re* Fialkowski**

Judgment No. 2072

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Konrad Rafal Fialkowski against the United Nations Industrial Development Organization (UNIDO) on 18 August 2000, UNIDO's reply of 28 November 2000, the complainant's rejoinder of 4 January 2001, and the Organization's surrejoinder of 30 March 2001;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Polish national born in 1939, joined the staff of UNIDO on 1 January 1982. By the time his service with the Organization ended in 1997 he was at grade P.5.

A deficit in its budget led the Organization to establish a staff reduction programme and by bulletin UNIDO/DG/B.201 of 20 November 1995 the Director-General announced a programme for voluntary separation that offered incentives to certain staff members to consider agreed separation or early retirement. Staff members aged 54 and above were encouraged to consider taking early retirement (paragraph 5 of the bulletin). Paragraph 13 read as follows:

> "If they so wish, and subject to the age limits for employment, staff members opting for agreed termination will be considered for re-employment by UNIDO under staff rule 103.03, in the event of an improvement in the financial situation of the Organization and the availability of a suitable post."

On the same day the Director of Personnel Services wrote to the complainant, asking him "to seriously consider" applying for early retirement. On 23 January 1996, in a memorandum to that Director, the complainant accepted the conditions on early retirement offered by the Organization. By a letter of 14 February 1996 the Director informed the complainant that under the voluntary staff separation programme his fixed-term appointment would terminate in accordance with Staff Regulation 10.3 (c) with effect from 31 December 1997 and that he would be granted special leave without pay for 21 months, from 1 April 1996 to 31 December 1997. On 20 February 1996 the complainant confirmed his agreement by signing the letter of 14 February 1996. During the time he was on special leave without pay the complainant continued to provide his services as Scientific Editor to a UNIDO publication.

On 10 December 1997 the complainant asked the Director-General, on the basis of paragraph 13 of the bulletin, to re-employ him on a two-year contract up to retirement age. The Director of Personnel Services replied to him on 8 January 1998 that since the Organization was still reducing the number of staff the possibility of re-employment was rather low. On 20 February the complainant requested the Director-General to review "this administrative decision" and on 29 March the same Director replied on the Director-General's behalf that the situation was the same.

On 31 March the complainant requested authorisation to appeal directly to the Tribunal but the Administration denied it on 17 April. Therefore, on 7 May 1998 he filed his appeal with the Joint Appeals Board against the decision denying consideration of his request for re-employment in disregard of paragraph 13 of the bulletin and of Staff Rule 103.12(a)(ii) which says that when appointment is to be made preference is given to staff members already in the service of the Organization. In its report of 18 May 2000 the Board recommended that the appeal be rejected. It had concluded that the Organization did not have an obligation under paragraph 13 of the bulletin to re-employ the complainant at the end of his special leave without pay: the financial situation had not improved, there was no availability of a suitable post, and there was no evidence that the complainant's rights had been violated under Staff Rule 103.12 (a) (ii). On 15 June 2000 the Officer-in-Charge of UNIDO endorsed the recommendation. On 19 June that decision was forwarded to the complainant by the Alternate Secretary of the Board as the "Director-General's decision", and is the one under challenge.

B. The complainant points out that in a memorandum of 14 December 1995 to the Director of Personnel Services, applying for voluntary separation under the terms of bulletin DG/B.201, he had expressly asked for the inclusion of a clause regarding re-employment under paragraph 13 to be added to the conditions governing his special leave without pay. Therefore, this memorandum constitutes "irrefutable evidence" that his acceptance of separation was voluntary "in form only" and had "been obtained under duress and force of circumstance".

He contends that at the end of his special leave without pay UNIDO denied him the opportunity to return to active duty by depriving him of consideration of his candidature. Citing the Tribunal's case law he says he should have had priority over outside candidates when UNIDO was seeking to fill vacancies and that such is made clear by Staff Rule 103.12(a)(ii). He was also denied the opportunity to be compared with other candidates as recruitment went ahead without any vacancy notices being issued.

Further, the Organization had a commitment to consider his return to active duty under paragraph 13 of the bulletin. But it failed to recognise that the three conditions for re-employment contained therein had been met. He fulfilled the first, regarding age limits, since he was below the mandatory retirement age when he sought re-employment. The other two required that there be an improvement in the financial situation of the Organization and that a suitable post be available: those conditions were met. Vacancies were available. Indeed there is "incontrovertible evidence" that new staff members had been and were being recruited by UNIDO. He points to the Joint Appeals Board's finding that external recruitment had taken place at the time when he was seeking re-employment. Consequently, the Organization breached paragraph 13.

He submits that the Joint Appeals Board erred in its finding and disregarded evidence. It made no reference to "denial of consideration" which constituted the principal claim put forth in his appeal. It found that the services he rendered as Scientific Editor were offered on a voluntary basis, even though he had written to the Director-General stating that he would claim remuneration for his work. Moreover, he says it was up to the Administration to finalise his working relationship in writing. Its failure to do so did not release it from the obligation to remunerate him for the work performed.

Finally, he accuses the Organization of lacking good faith and intentionally delaying the Joint Appeals Board proceedings.

The complainant asks the Tribunal to: (1) quash the decision upholding "the denial of consideration of [his] return to active duty" and award him compensation of 111,000 United States dollars; (2) declare "invalid" the statement made by the Joint Appeals Board that his services as Scientific Editor were voluntarily rendered and order payment of remuneration of 93,000 dollars for these services; (3) award him compensation of 30,000 dollars for "obstruction of the course of justice"; and (4) award him 50,000 dollars in moral damages.

C. In its reply the Organization states that the complainant applied for voluntary separation in accordance with UNIDO Staff Regulation 10.3 (c) and the voluntary separation programme outlined in bulletin DG/B.201. He was treated in a way that fully safeguarded his rights as a staff member and the conditions of his separation were "the most generous and advantageous" the Organization could grant. Furthermore, it maintains that paragraph 13 of the bulletin was properly applied to the complainant's case; this paragraph does not guarantee re-employment for employees opting for agreed termination, it establishes the conditions under which UNIDO will "consider" them for re-employment. At the time the complainant wished to be re-employed there had been no improvement in the financial situation of UNIDO nor was there a position suitable to his skills or experience. Additionally, the complainant did not apply for P.5-level vacancies that were advertised between April 1996 and December 1997. The complainant's reliance on the case law is misplaced. He has not shown that the Organization breached any rule regarding re-employment or the filling of vacancies; it was not in a "legal position" to provide the complainant with an appointment.

UNIDO refutes the complainant's claim to remuneration for his services as Scientific Editor: he has not proven that the Organization had agreed to pay him. In fact, it could not have agreed to that when he was on special leave without pay. Furthermore, he undertook this work at his own initiative.

Regarding the complainant's claim to compensation for obstruction of justice, it states that there were no intentional delays in handling his appeal, nor has he produced any evidence of this. Any delays were a result of the increased number of cases due to the staff reduction exercise in 1996.

D. In his rejoinder the complainant contends that the Organization attempted to modify the substance of his case by reformulating the issues. He submits that the case law he relies on is indeed relevant: it is linked to "the abolition of a post and the search for another post". He notes that UNIDO did not deny in its reply that it was engaged in recruitment during the time period he wished to be re-employed. It issued contracts to two former colleagues that had similar professional profiles as the complainant. He denies intending to perform his work as Scientific Editor on a voluntary basis and he "explicitly expressed" that fact in his letter to the Director-General dated 10 December 1997. He presses his accusation regarding the intentional delay in dealing with his appeal.

E. In its surrejoinder UNIDO maintains that neither paragraph 13 of the bulletin nor Staff Rule 103.03 (referred to therein) create an obligation for it to re-employ a former staff member. The complainant did not apply for any advertised vacancy during his special leave without pay and the Organization was under no obligation to compare his qualifications with those of candidates who submitted applications. It recalls that the complainant chose to take advantage of the separation agreement and he cannot now contest it. The Organization reiterates that the case law cited by the complainant is of no relevance because he was not in the same situation in fact or in law as the complainants in the cases he refers to. As for his argument regarding the contracts issued to two of his former colleagues, UNIDO reiterates that the complainant did not apply for the posts in question. Furthermore, the appointments were made in February and March 1998, when he was no longer a staff member.

It denies the accusations that it has intentionally delayed the proceedings before the Joint Appeals Board.

CONSIDERATIONS

1. The complainant joined UNIDO on 1 January 1982. As from 1 May 1982 he was awarded a fixed-term appointment for two years which was renewed regularly until UNIDO decided to implement a programme for voluntary separation as a means of reducing its expenditure. In a memorandum of 14 December 1995 the complainant sought special leave without pay until the end of 1997 and expressed his intention of resuming service whenever that became possible. He agreed to take part in the voluntary programme having negotiated the terms of his acceptance with Personnel Services. By a decision of 14 February 1996 the Director of Personnel Services set 31 December 1997 as the date on which the complainant's appointment would terminate. He would be placed on special leave without pay as from 1 April 1996 for a period of twenty-one months during which he would continue to pay his contributions to the United Nations Joint Staff Pension Fund and the sickness insurance scheme administered by the insurance brokers Van Breda. On 20 February 1996 the complainant confirmed his acceptance and undertook not to challenge his separation or seek any further compensation.

2. On 10 December 1997 he wrote a letter to the Director-General explaining that he had been "forced to leave the Organization". He also sought a two-year contract to bring him up to retirement age, citing paragraph 13 of the Director-General's bulletin UNIDO/DG/B.201 of 20 November 1995 in support of his request. After a negative reply from the Director of Personnel Services, he asked the Director-General to reconsider his decision, but was informed by a letter of 20 March 1998 that UNIDO was still in financial straits, which considerably limited the possibility of its re-employing former staff. The complainant therefore asked for leave to take

his case straight to the Tribunal. His request having been refused, he filed an appeal with the Joint Appeals Board on 7 May 1998.

3. The Board did not report until 18 May 2000. It recommended that the Director-General reject the appeal, on the grounds that paragraph 13 of the bulletin laid no obligation on the Organization to re-employ the complainant at the end of his special leave without pay. Indeed two of the conditions stipulated therein had not been met, and there was no evidence of any breach of Staff Rule 103.12(a)(ii) which says that in filling vacancies preference must be given to staff members already in the service of the Organization. By a decision of 15 June 2000, notified to the complainant on 19 June 2000 by the Alternate Secretary of the Board, his appeal was rejected on the basis of that recommendation.

4. In his complaint, the complainant seeks the quashing of the decision to uphold UNIDO's refusal to consider his return to active service at the end of his special leave without pay. He claims 111,000 United States dollars in compensation for the injury the decision caused him. He also asks the Tribunal to declare "invalid" the Board's assertion that his services as Scientific Editor to a UNIDO publication while he was on special leave were voluntary, and to award him 93,000 dollars for his editorial work. Lastly, he claims 30,000 dollars in compensation for UNIDO's obstruction of the course of justice, and 50,000 dollars in moral damages.

5. In challenging the refusal to consider his request for re-employment, the complainant cites two provisions – paragraph 13 of the bulletin which says:

> "If they so wish, and subject to the age limits for employment, staff members opting for agreed termination will be considered for re-employment by UNIDO under staff rule 103.03, in the event of an improvement in the financial situation of the Organization and the availability of a suitable post."

and Rule 103.12(a)(ii) under which, in filling vacancies preference is normally given "where qualifications are equal, to staff members already in the service of the Organization and staff members in other organizations participating in the United Nations common system".

6. As to paragraph 13 of the bulletin, it is plain on the evidence that despite staff retrenchment, UNIDO's financial position had not so improved as to allow it to offer new posts to staff members who had left under the voluntary programme; and that the complainant applied for none of the five P.5 posts that fell vacant between April 1996 and December 1997, since none of them really matched his profile, as the Board rightly pointed out. Consequently, the Organization cannot be taken to task for not considering him for posts for which he had not applied, or for not offering him another one while it was still in financial straits. The conclusion is that the complainant's plea of breach of paragraph 13 of the bulletin must fail.

7. So too must his plea of breach of Rule 103.12(a)(ii). The Organization did fill a number of posts in 1998, some of which might have suited him, but it was not obliged to inform him about such vacancies, since from 1 January 1998 the complainant was no longer a staff member. As to the posts at the complainant's level filled before that date, they were advertised but the complainant either could not or did not apply, as already noted. Lastly, there is no evidence of any post of his level being filled between 10 December 1997, when he asked to be re-employed and 1 January 1998, when he left the Organization.

8. The complainant stresses – and he may well be justified in doing so – that the nub of the case he put to both the Director-General and the Appeals Board was the following: UNIDO overlooked him in considering candidates for the vacant posts, and that denial of prior consideration is the basis of his pleas and of his main claim to compensation. However, the Tribunal can find no fault with the conclusion reached by the Board – and by UNIDO, which acted on its recommendations – that the Organization was not bound to re-employ the complainant at the end of his special leave. In so concluding the Organization did not overlook the complainant's pleas; and there is no evidence that UNIDO never intended to honour its obligation under paragraph 13 of the bulletin, as the complainant alleges.

9. As for the complainant's editorial work while he was on special leave without pay, the Joint Appeals Board rightly noted that he undertook it voluntarily, and however great its scientific worth, there exists no

his case straight to the Tribunal. His request having been refused, he filed an appeal with the Joint Appeals Board on 7 May 1998.

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8. The complainant stresses – and he may well be justified in doing so – that the nub of the case he put to both the Director-General and the Appeals Board was the following: UNIDO overlooked him in considering candidates for the vacant posts, and that denial of prior consideration is the basis of his pleas and of his main claim to compensation. However, the Tribunal can find no fault with the conclusion reached by the Board – and by UNIDO, which acted on its recommendations – that the Organization was not bound to re-employ the complainant at the end of his special leave. In so concluding the Organization did not overlook the complainant's pleas; and there is no evidence that UNIDO never intended to honour its obligation under paragraph 13 of the bulletin, as the complainant alleges.

9. As for the complainant's editorial work while he was on special leave without pay, the Joint Appeals Board rightly noted that he undertook it voluntarily, and however great its scientific worth, there exists no

statement by UNIDO that it was to be remunerated. In the absence of any agreement and, it would appear, any formal request from the complainant before he gave up the editing work, there are no grounds for ordering the Organization to compensate him for a job he volunteered to do.

10. It is nonetheless true that the appeal procedure was inordinately long: the case was before the Committee for two years, yet it was not a very difficult one and it needed to be settled promptly in view of the nature of the decision to be taken and the complainant's age. In these circumstances, the delay in resolving it amounts to negligence warranting compensation. The Tribunal therefore considers that the complainant is entitled to redress, and it sets the amount at 3,000 United States dollars.

11. Since his complaint partly succeeds, he is also entitled to costs, which the Tribunal sets at 1,000 dollars.

DECISION

For the above reasons,

1. UNIDO shall pay the complainant 3,000 United States dollars in compensation.
2. It shall pay him 1,000 dollars in costs.
3. His other claims are dismissed.

In witness of this judgment, adopted on 9 May 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

NINETY-FIRST SESSION

In re **Concannon (No. 2),**
Samwel and Sundqvist

Judgment No. 2073

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr Brian Stephen Concannon, the complaints filed by Mr Peter Nicolaas Samwel and Mr Stefan Vilhelm Sundqvist against the European Patent Organisation (EPO) on 20 September 2000, the EPO's replies of 15 December 2000, the complainants' rejoinders of 7 February 2001, and the Organisation's surrejoinders of 6 April 2001;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainants are patent examiners at grade A3 in Directorate-General 2 (DG2) of the European Patent Office, the EPO's secretariat.

On 18 March 1997 all examiners of DG2 were informed that two new screens, defined as "BP2 and BP3", displaying new data were to be introduced into the "Patent Office Examination Management" system (known as POEM), which provides information on production. The screens displayed data as calculated by a new production measurement system of examiners' output and were to be used to improve the method of calculating production at the Directorate-General, Principal Directorate and examiner levels.

In an opinion issued on 26 May the Data Protection Officer stated that the fact that the implementing rules for using POEM data to monitor individual performance had not yet entered into force, raised the question of whether there was an infringement of Article 21(3) of the Guidelines for the Protection of Personal Data in the European Patent Office (hereinafter "Data Protection Guidelines"), which took effect in 1992. He conceded, however, that the new screens – BP2 and BP3 – need not be necessarily viewed as a major change within the meaning of Article 21(3), because the basic data remained the same and only the calculation method had been modified. He said, however, that it "would have been closer to the spirit of Article 21(3)" if the General Advisory Committee had had the opportunity to discuss the matter beforehand.

Article 21(3) of the Data Protection Guidelines states:

> "Until the appropriate implementing rules ... enter into force the existing Office procedures permitting automated individual performance checks may continue to be applied but their content may not be expanded nor may their use insofar as personal data are concerned be extended."

On 19 June 1997 each of the complainants lodged an appeal challenging the introduction of the screens – BP2 and BP3 – on the basis that they represented an expansion of the content of personal data permitting automated individual performance checks; consequently, their use violated Article 21(3) of the Data Protection Guidelines.

In a note of 1 July 1997 the Office's Data Protection Officer informed the Vice-President of DG2 that he had undertaken a review of the new screens and concluded that they did not constitute a "substantive extension of the existing automated performance monitoring procedures" and that there was therefore no violation of Article 21(3). On 31 July 1997 the President of the Office sent a copy of this note to the complainants stating that he was referring the internal appeals to the Appeals Committee for an opinion.

The "Implementing rules for the use of personal data stored in the POEM system for the checking of individual performance" entered into force with effect from 15 September 1998. The procedure for adopting and implementing the rules is not contested.

In its opinion of 6 December 1999 the Appeals Committee, having regard for the alleged breaches of the Data Protection Guidelines, unanimously recommended that a review of the disputed measure – i.e. the introduction of the two new screens – be carried out. The President endorsed this recommendation. After undertaking a new review of the screens the new Data Protection Officer found that an individual examiner's data could be seen on the screens between 10 March 1997 and 15 September 1998 and concluded that during that period they were not in compliance with Article 21(3). The contradiction from the previous finding was attributed to a difference in information available at the time each review took place.

In letters of 25 July 2000 the President of the Office informed each of the complainants that notwithstanding the fact that the Data Protection Officer found that the Guidelines had been breached, the "situation has been regularised" by the adoption of the implementing rules. The President rejected the claims for moral damages for lack of substantiation and failure to show personal injury. Furthermore, he considered the breach of the Guidelines to be "of a purely formal nature". That is the impugned decision.

B. The complainants argue that they were adversely affected by the introduction of the screens up to the time when the implementing rules were put in place. It was not just a violation "of a purely formal nature" of a minor regulation but an admitted violation of the Data Protection Guidelines. Furthermore, it took months for the Data Protection Officer to establish the true nature of the violation. Most staff might not be aware that their personal data are being compiled and are open to abuse; thus the Guidelines are designed "to protect the staff precisely where they are not in a position to protect themselves". The breach of the Guidelines meant that over a period of eighteen months the personal data of all the examiners in DG2 could have been used by unauthorised people in an unauthorised way.

The complainants ask the Tribunal to set aside the President's decision of 25 July 2000 in so far as it refused the payment of moral damages, and to award each of them 1,850 euros (i.e. 100 euros per month for each month the breach went uncorrected) in moral damages and 1,000 euros in costs.

C. In its replies the Organisation asks for the joinder of the three complaints since the issues of fact and law are identical in each.

It states that the system in question provided information "on production at Directorate-General, Principal Directorate and examiner" levels. After completing the first review of the screens in 1997 the Office's Data Protection Officer concluded that the introduction of the new screens did not constitute an extension of the existing automated performance monitoring procedures and therefore there was no breach of Article 21(3) of the Data Protection Guidelines. Even though the review which took place following the Appeals Committee's recommendation did reveal that a breach had existed during a certain period of time, it had already been rectified. Since the complainants have not shown that they have suffered any injury, the Organisation sees no justification in their claim to moral damages.

D. In their rejoinders the complainants state that they have no objection to the joinder of their complaints.

They assert that the implementing rules did not enter into force until 15 September 1998, that is about 15 months after their appeals were filed and 18 months after the screens were introduced. They consider the relevant point to be that the new screens did represent an expansion of procedures for automated individual performance checks that was prohibited by the then-existing Data Protection Guidelines. The system also made information available to their direct superiors, i.e. the directors, and not just at the "Directorate-General, Principal Directorate and examiner" levels as the EPO stated in its replies. They contend that the Organisation's data protection regime is outdated compared with current technology and represents bare-minimum standards.

The fact of the matter remains that the EPO was operating "an unauthorised data system" until that time when the new implementing rules were adopted, whereas it could have suspended use of the screens while the matter was under dispute. The complainants reiterate that moral damages are the only, and also an appropriate, remedy in this case.

E. In its surrejoinders the EPO says that it did not conceal the fact that the Data Protection Guidelines were breached over the period from March 1997 to September 1998. It was also for a limited period that information provided through the POEM system was available to directors responsible for staff reporting. However, it presses its plea that the complainants have not shown that they have suffered any injury by the breach, and therefore their claim to damages has no merit.

The Organisation refutes the argument that it should have suspended use of the screens while the appeals were pending. Since the Data Protection Officer found no evidence of breach in the review in July 1997 there was no reason for the EPO to suspend use of the screens. Furthermore, Article 107(3) of the Service Regulations for Permanent Employees of the European Patent Office supports this view: it provides that lodging an internal appeal does not suspend the decision against which the appeal has been lodged.

CONSIDERATIONS

1. The EPO applies for joinder of the three complaints on the ground that they raise the same issues of fact and law, impugn the same decision and seek the same redress. To the complainants' identical briefs, filed in support of their complaints which followed an identical internal appeals procedure for which the Appeals Committee issued a single opinion, the Organisation submitted correspondingly identical replies. The complainants see no reason to object to this application.

2. Before the Tribunal will join two or more complaints and deal with them in a single judgment, two conditions must be fulfilled. The first is that the substance of the claims must be the same. The second condition is that the material facts, viz. those on which the claims rest and which are relevant thereto should be the same (see Judgment 657, *in re* Metten and others, under 1).

3. On both counts, and the causes of action being one and the same, the Organisation's application for joinder is granted.

4. The three complainants are all patent examiners at grade A3 assigned to Directorate-General 2 (DG2). On 18 March 1997 the examiners of DG2 were informed through a bulletin that two new screens, defined as "BP2 and BP3", were to be introduced into the "Patent Office Examination Management" system (known as POEM).

5. On 19 June 1997 the complainants each filed an internal appeal objecting to the introduction of these two new screens and alleging that modifying the POEM system through the introduction of these screens represented an expansion of the content of personal data permitting automated individual performance checks and infringed Article 21(3) of the Data Protection Guidelines. They requested "that the modifications in the program be annulled and that they be paid ... 1 000 [German marks] compensation for every month from 1 July 1997 onwards that the new screens remain in use".

6. In a note dated 1 July 1997 the Data Protection Officer reiterated the opinion he had expressed in a previous document dated 26 May 1997 that the introduction of the screens – BP2 and BP3 – is not to be viewed as an expansion of the content of the existing procedures to automate performance monitoring. In other words, he saw no infringement of the Guidelines.

7. On 31 July 1997 the President of the European Patent Office sent the complainants a copy of the Data Protection Officer's note. He informed

them that he could not allow their appeals and said that he was submitting them to the Appeals Committee for an opinion.

8. In its opinion dated 6 December 1999 the Appeals Committee stated that the Administration should be given the opportunity to review current practice and refer the matter back to the Data Protection Officer, as requested by the appellants. It unanimously recommended that a review be carried out of the disputed measure, that is the introduction of the two new screens into the POEM system.

9. By letters of 19 January 2000 the President informed each of the complainants that he had "asked the Data Protection Officer to produce a report along the lines set out by the Appeals Committee" and that he would take a decision on their appeals only after receiving that report.

10. In his report submitted to the President, the new Data Protection Officer concluded that "the introduction of the new BP2 and BP3 screens between 10 March 1997 and 15 September 1998 (date of entry into force of the POEM implementing rules) did not comply with the requirements of the [Data Protection Guidelines] because this introduction represented an expansion of existing Office procedures for automated individual performance checks within the meaning of Article 21(3) of [the Guidelines]". He further concluded that it was only upon the entry into force of the implementing rules for the POEM system, on 15 September 1998, that the screens – BP2 and BP3 – "became compliant" with the Guidelines.

11. In letters of 25 July 2000 to each of the complainants, the President accepted the findings of the Data Protection Officer. He said:

> "during a limited period and in the absence of the required formal authorisation, there was a breach of the Data Protection Guidelines. However, you have not shown any personal damage caused by this breach, which was of a purely formal nature.
>
> I consider that, in view of these circumstances, there is no justification for paying moral damages."

It is this decision that is now being impugned.

12. Each complainant requests the Tribunal to order that:

> "(1) The decision of the President dated 25.07.00 is set aside in so far as it refuses the payment of moral damages.
>
> (2) The [Organisation] shall pay the complainant 1 850 (one thousand eight hundred and fifty) euros in moral damages.
>
> (3) The [Organisation] shall pay the complainant 1 000 (one thousand) euros in costs."

13. Adverting to paragraph 11, the President admitted that the Administration indeed committed a breach of the Guidelines. This was based on the findings of the Data Protection Officer who, among other things, pointed out that giving superiors access to the individual examiner's data displayed on the screens was in conflict with the Guidelines.

14. The President downplayed this breach, however, saying it was "of a purely formal nature" i.e. that when the controversial screens were introduced, the implementing rules required by the Data Protection Guidelines had not indeed entered into force. But when they did on 15 September 1998, the requirements of the Guidelines were met and the "formal flaw" was rectified.

15. Contrary to the President's view, a breach of the Guidelines in question cannot be dismissed in a cavalier manner as being "purely formal" in nature, that is, relating merely to form and not to the substance of the issue.

16. Although the Guidelines, which took effect in 1992, obligated the EPO to lay down implementing rules "governing the permissible subject-matter, purpose and scope of performance monitoring", this was not done until 15 September 1998. However, in his letter of 19 January 2000 the President had shown his awareness of the importance of data protection with these words: "clearance of these questions, some of which concern matters of principle, is in the interest of data protection". Hence, the eighteen-months (from March 1997 to September 1998) when the employees were not protected must be deplored. Since this question involves electronic surveillance, it must be monitored by data protection; the

EPO itself failed to follow its own rules by the delay in bringing in the implementing rules.

17. While the complainants have not shown any prejudicial consequences, the Tribunal nevertheless will sanction the EPO's breach by a nominal global award of damages amounting to 1,000 German marks and a global award for costs amounting to 2,000 euros.

DECISION

For the above reasons,

1. The decisions of the President dated 25 July 2000 are set aside in so far as they refused payment of moral damages.
2. The defendant shall pay the complainants a nominal global award of damages amounting to 1,000 German marks.
3. It shall pay them a global award of 2,000 euros for costs.

In witness of this judgment, adopted on 3 May 2001, Miss Mella Carroll, Vice-President of the Tribunal, Mr James K. Hugessen, Judge and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

Mella Carroll

MELLA CARROLL

James

JAMES K. HUGESSEN

Flerida Ruth P. Romero

FLERIDA RUTH P. ROMERO

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL
GENEVA

CATHERINE COMTET

Registry's translation, the French text alone being authoritative

NINETY-FIRST SESSION

***In re* Pinto (No. 3)** **Judgment No. 2074**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr Antonio Pinto against the International Telecommunication Union (ITU) on 31 August 2000, the ITU's reply of 20 October 2000 and Ms H.'s comments attached thereto, the complainant's rejoinder of 9 January 2001, the Union's surrejoinder of 14 February, the submissions provided by the ITU on 5 March at the Tribunal's request, the complainant's observations thereon of 15 March and the Union's comments of 23 March 2001 on those observations;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant's career is summed up in part in Judgment 1646 on his first complaint.

From 1 April 1997 to 28 February 1998, with an interruption of one month in October 1997, the complainant carried out the duties of acting Head of the Archives Service, for which he was granted a special post allowance at grade P.2. He also received a special post allowance from 1 July to 30 November 1998 to compensate him for additional responsibilities that he was given in his job, but without actually being assigned to the post of Head of the Archives Service.

That post was put up for competition on 6 October 1998. The complainant applied. On 25 January 1999 the deputy Chief of the Department of Common Services submitted to the acting Chief of the Personnel and Social Protection Department a list of five candidates. The complainant was not among them. However, he was placed on a short list of five drawn up by the Appointment and Promotion Board on 29 January 1999. In a memorandum of 17 March the Chief of Common Services recommended appointing Ms B. He indicated that another candidate, Ms H., also met the requirements but that in his view, the other three candidates were unsuitable. The staff of the Archives Service were informed orally on 12 May of Ms B.'s appointment. By a memorandum of 16 June the complainant sought confirmation of that appointment from the Chief of Common Services, who replied on 23 June that such information being confidential, he was transmitting the request to the Personnel Department. On the previous day, however, the complainant had asked the Secretary-General in a memorandum to reconsider the appointment. In the absence of a reply he appealed on 13 September to the Appeal Board. Ms B. having refused the offer, Ms H. was appointed to the post.

In its report of 21 December 1999, sent to the complainant on 11 January 2000, the Appeal Board recommended rejecting the appeal. It indicated that, among other documents, it had examined "the correspondence leading up to the memorandum of 29.3.94 [from the Chief of the Common Services Department to the complainant] (with the request that it be placed on his file) concerning his conduct vis à vis his supervisors". In a memorandum of 14 February 2000, denying any previous knowledge of the memorandum of 29 March 1994, the complainant asked the Chief of Personnel to send him a copy of it. In an e-mail message of 16 February 2000 the complainant told the Chairman of the Appeal Board that the former acting Chief of Personnel had informed him orally the previous day that he had twice advised the Secretary-General to select him for the post. Having received a copy of the memorandum requested, the complainant informed the Chief of Personnel in a memorandum of 6 March that he had never seen it before. He therefore wished it to be removed from his personnel file because it had no lawful existence. He sent a copy of that memorandum to the Chairman of the Appeal Board. By a memorandum addressed to the Secretary-General on 8 March 2000, the Appeal Board asked the Personnel Department to clarify the acting Chief of Personnel's recommendations and the memorandum of 29 March 1994. On 23 March 2000 the Chief of Personnel supplied copies of the two recommendations and indicated that he was not in a position to affirm that the complainant had received the memorandum of 29 March 1994.

On 4 April 2000 the Appeal Board decided to re-examine the complainant's appeal in the light of these new facts. It drew up a list of the documents in the complainant's personnel file which could be of use in examining the appeal, but took into account only those whose existence could not be challenged. In its amended report, dated 7 April 2000, the Board recalled the Secretary-General's explanation that the complainant's candidacy had failed because of interpersonal problems in the course of his work, particularly with his colleagues. But, the Board noted, the problems had been only with his supervisors and were a long time ago. It found that the Chief of Common Services had based his recommendation mostly on inconclusive evidence about the complainant's interpersonal relations. It observed that the acting Chief of Personnel had based his two recommendations in favour of the complainant's appointment on the fact that his performance as acting Head of the Archives Service had been excellent; he had never been promoted since his recruitment in 1984; he was a national of a country which was not represented in the Professional category; and he had the necessary knowledge of the ITU to discharge the duties in question. The Board further observed that while the selection of Ms B., the original choice, had been unanimous, there was nothing to indicate unanimity in the case of Ms H., the candidate finally appointed. It found that proper practice had not been fully observed in compiling the complainant's personnel file, which contained inconsistencies. Its principal recommendation to the Secretary-General was that he reconsider his position about the appointment to the post "with a view to finding a solution to a situation which has persisted and in which subjectivity has prevailed to the detriment of the appellant". In the absence of a decision by the

Secretary-General, the complainant challenges the implied rejection of his appeal.

B. In his submission, the complainant refers to the Appeal Board's amended report. He requests the Tribunal to "recommend to the Secretary-General of the ITU [his] appointment ... to the post of Head of Archives" or else to grant him 200,000 Swiss francs for the damage to his career. He also seeks 50,000 francs in moral damages, 15,000 francs in compensation for the stress caused him by the Appeal Board's first report, and 6,000 francs in costs. He requests that a time-limit be set for the execution of the judgment.

C. In its reply the ITU recalls that appointments are at the discretion of the executive head of an organisation and are subject to only limited review. Since the Tribunal may not order the appointment of a specific candidate, the complainant's claim to that effect is irreceivable.

The Union observes that his having acted as Head of the Archives Service confers no right of appointment to the post. The rating "very good" in his staff report of 22 May 1997 refers only to two months during which he discharged those duties, which is too short a period to assess whether he is suited to them in the long term. The ITU contends that the rule of preference for internal candidates or nationals of countries under-represented in the Union applies only in the event of equal qualifications, which was not the case here. It sees misappraisal of the facts in the Appeal Board's findings that the order of preference in the recommendations of the Chief of Common Services was not based only on professional criteria and that the appointment of Ms H. was not agreed on unanimously. In endorsing the arguments of the acting Chief of Personnel, the Board did not judge the professional qualifications of the complainant, but based itself on considerations of expediency related to his career. It thus proposed his appointment, not with a view to "securing for the Union the highest standards of efficiency, competence and integrity", as required by Regulation 4.1 of the Staff Regulations, but rather in order to "find a solution". Lastly, the memorandum of 29 March 1994 is not the only document in his file to reveal the complainant's difficulties with interpersonal relations.

In the comments that she supplied at the Tribunal's invitation Ms H. notes that preference may be given to a particular nationality only when other qualifications are equal. She submits that she is better qualified for the post than the complainant.

D. In his rejoinder the complainant alleges inconsistency on the part of the Administration. The deputy Chief of Common Services did not recommend including the complainant on the short list, yet it was he who recommended his temporary appointment as acting Head of the Archives Service. The complainant points out that he was put on the short list when the post was previously advertised, in 1992. Furthermore the Appointment and Promotion Board was unanimous about including him in the short list, and thus acknowledged his professional competence. The complainant considers that the renewal of his "appointment" to the post of acting Head of the Archives Service amounts by implication to a favourable appraisal of his performance. He points to flaws in the assessment of his qualifications and confirms that the order of preference established by the Chief of Common Services was indeed based on considerations other than professional qualifications. He denies that there was unanimity about appointing Ms H.: the acting Chief of Personnel, who was among those who interviewed her, preferred to recommend the complainant.

Lastly, on 2 October 2000 the ITU informed the Head of the Archives Service that her appointment was being challenged. The next day the Head of the Library and Archives Service sent the complainant an e-mail message seeking very specific information about his qualifications, without explaining why. He suspects the ITU of wanting to use the information against him without his knowledge.

E. In its surrejoinder the ITU contends that there was no renewal of the complainant's "appointment" as acting Head of the Archives Service. He was paid a special post allowance from 1 July to 30 November 1998 because he took on additional responsibilities; however, it did not mean that he was acting Head of the Service. It rebuts the intentions ascribed to it by the complainant: it was well acquainted with his curriculum vitae and so had no need to "delegate" the Head of the Library and Archives Service to obtain that information.

F. At the Tribunal's request the ITU provided the documents listed by the Appeal Board during its second examination of the case.

G. In his observations on those documents the complainant endorses the analysis of the Appeal Board which has examined them. He contends that, in addition to the memorandum of 29 March 1994, several of the documents produced were not communicated to him and so have no lawful existence. He adds that some of them are immaterial to the present case and at times are even misleading.

H. In its comments on the complainant's observations the ITU recalls that the documents were those listed by the Appeal Board. It therefore expresses surprise at the complainant's assertion that some of them are unknown to him. As to their relevance, the ITU points out that it produced them at the Tribunal's request and has refrained from all comment on them.

CONSIDERATIONS

1. The complainant's career is summed up in part in Judgment 1646 (*in re* Pinto).

Having joined the ITU in 1984 he got a permanent appointment on 2 October 1987 at grade G.5. In 1996 he was assigned to the Archives Service. From 1 April 1997 to 28 February 1998, he discharged the duties of acting Head of that Service, which belongs to the Library and Archives Service of the Department of Common Services.

The post of Head of the Archives Service was put up for competition on 6 October 1998. The complainant applied.

On 25 January 1999 the deputy Chief of Common Services submitted to the acting Chief of the Personnel and Social Protection Department a list of five candidates which did not include the complainant.

The applications were referred to the Appointment and Promotion Board, which was to draw up a short list of suitable candidates for the Secretary-General. The Board produced a list on 29 January comprising the complainant, who was the only internal candidate, and four others including Ms B. and Ms H.

The Chief of Common Services formed a panel of three – himself, the Head of the Library and Archives Service and the acting Chief of Personnel – to prepare a recommendation for the Secretary-General. The panel examined the five applications selected by the Appointment and Promotion Board and interviewed the candidates.

In a reasoned report of 17 March 1999, the Chief of Common Services informed the Secretary-General that on the strength of the candidates' replies to questions put to them, the members of the panel unanimously recommended appointing Ms B. or, failing that, Ms H. However, none of the other three candidates were to be recommended. The Chief of Common Services added that he would advise the acting Chief of Personnel as to how the complainant could improve his interpersonal relations with the staff in his Service.

On 26 March the acting Chief of Personnel, in a communication addressed to the Secretary-General, recommended appointing the complainant.

Having heard at a meeting of 12 May 1999 that Ms B. had been selected, the complainant sought confirmation of her appointment, but to no avail. On 22 June 1999 he asked the Secretary-General to reconsider his decision not to appoint him, but got no reply to that request either.

Even though on 2 June 1999 the acting Chief of Personnel again recommended the complainant, the Secretary-General endorsed the proposal made by the Chief of Common Services and appointed Ms H., Ms B. having refused the offer in the meantime.

Since the Secretary-General had still not answered the request to reconsider the decision not to appoint the complainant, the latter lodged an appeal with the Appeal Board on 13 September 1999.

In a report of 21 December 1999 the Board recommended the Secretary-General to reject the appeal. The report was sent to the complainant, with the indication that he would receive a final decision from the Secretary-General in the near future. However, no formal decision was issued.

After consulting the documents cited in the report, the complainant went back to the Appeal Board, to which he submitted a number of documents. The Board decided to reopen the case. On 7 April 2000 it issued an amended report in which it recommended allowing the appeal.

The Secretary-General has not issued a formal decision.

2. The complainant is asking the Tribunal to "recommend" his appointment to the post of Head of the Archives Service or else to grant him 200,000 Swiss francs for the harm done to his career. He also claims 50,000 francs in moral damages, citing in particular the accusation that he did not get on with his colleagues, which he deems libellous; 15,000 francs for the stress caused by the Appeal Board's first report; and 6,000 francs in costs. He also asks the Tribunal to set a time-limit for the execution of the judgment.

The ITU seeks dismissal of the complaint.

In observations submitted at the Tribunal's request, Ms H. states that she is better qualified than the complainant and contends that there was nothing unlawful about her appointment.

3. Lack of substantiation is not one of the complainant's pleas. During the appeal procedure the Secretary-General expressly confirmed his rejection of the complainant's candidacy and gave the reasons for it, so the complainant had every opportunity to comment on them. His right to be heard was thus respected.

The same is true for Ms H., whose appointment the complainant is challenging by implication. If the complaint were to succeed the decision to appoint her would be set aside and her position in law would change, to her detriment. It is therefore only right that she has been given the opportunity to have her say.

4. Whether or not to appoint someone is a discretionary decision taken by the appointing authority. A steady line of precedent has it that such a decision is subject to only limited review and that the Tribunal will not set it aside unless it is *ultra vires*, or shows some formal or procedural flaw, or a mistake of fact or of law, or some essential fact has been overlooked, or there is misuse of authority, or an obviously wrong inference has been

drawn from the evidence (see, for example, Judgment 2020, *in re* Brillet, under 3, and the other cases cited therein).

5. The complainant cites contradictions in the proposals submitted to the Secretary-General. He points out that, contrary to the indications of the Chief of Common Services, the panel's proposal was not unanimous, since one of its members, the acting Chief of Personnel, submitted different proposals to the Secretary-General.

The Tribunal observes that since the acting Chief of Personnel received a copy of the report by the Chief of Common Services, it may be assumed that he would have reacted had he found it to be wrong. It is quite possible that he initially agreed to the proposals submitted to the Secretary-General by the Chief of Common Services, then changed his mind and made a different proposal in a personal capacity. Be that as it may, the Secretary-General received two proposals and was able to take them into account, so the differences cited were not such as to invalidate his decision.

However, the wording of the memorandum sent by the Chief of Common Services to the Secretary-General setting out the panel's proposal to appoint Ms B., is not such as to allow the Tribunal to declare with certainty that the subsidiary proposal, to appoint Ms H. and reject the three other candidates, was also unanimous.

6. As to the memorandum of 29 March 1994 in which the Chief of Common Services rebuked him for insubordination, the complainant claims that he never received it, yet it was in his personnel file, which had been made available to the panel responsible for proposing an appointment.

The Union emphasises that, as the rules require, copies of communications sent to the complainant were placed in his file without the Personnel Department necessarily so informing him. The Union does not know whether the memorandum of 29 March 1994 was actually sent to the complainant, but the Personnel Department received a copy and "legitimately" placed it in his file.

The burden of proving that a document was actually received by its addressee lies with the party which cites it in evidence. That rule also applies to the copies in the complainant's personnel file of the documents allegedly sent to him. Since the Union has not proved that the memorandum was actually sent to its addressee, it may not be taken into account.

However, even before the implied rejection the Secretary-General knew from the Appeal Board's amended report and the evidence on file that the complainant denied having received the memorandum and that the Administration had failed to prove the contrary. In other words the complainant had had ample opportunity to make his position known, and it was clear even before the implied rejection that the memorandum could not be cited against him. Consequently, the evidence was not distorted.

7. In essence, the complainant's contention is that the decision rested on grounds that were wrong in fact and in law. He cites in particular the conclusions reached by the Appeal Board in its amended report, arguing that since he was equally well qualified as the two candidates who were successively selected for the post he ought to have been given preference, especially because he was the only internal candidate and because of his nationality, there being no Bolivians in the Professional category. He contends that, in actual fact, his application was discarded not for professional reasons, but because he was said not to get on with his colleagues, an allegation he categorically denies. Moreover, on the strength of his personnel file the Appeal Board noted that his difficulties had been only with his supervisors and were a thing of the past.

The ITU demurs. It denies that the Secretary-General's decision exceeded his discretionary power of appointment. The sole aim was to appoint the candidate best qualified for the post, and the two candidates who were successively selected were better qualified than the complainant. Accordingly, there was no need to resort to the secondary criteria applied where candidates are on a par, such as the fact of being an internal applicant or of a particular nationality.

Since the decision was an implied one, the reasons for it were not stated. However, they are indicated in the Secretary-General's reply to the Appeal Board and the Union's reply to this complaint.

It is plain from those reasons that the appointing authority based its decision first and foremost on purely professional qualifications, but also took into account the complainant's character and the difficulties he had in his working relations.

In its reply to the complaint, the ITU confirms all the reasons given in the reply to the Appeal Board, in which the Secretary-General said:

> "Notwithstanding ... the complainant's professional competence as a librarian-archivist, it has to be noted ... that his personnel file, and particularly his staff reports contain many references to the communication problems experienced in working relations, particularly with his colleagues. Consequently, the official responsible for Common Services, who as such was in charge of recruitment to the post, cannot be criticised for having taken into account all the documents in the complainant's administrative file in reaching a decision as to which candidate to recommend. Furthermore, these documents being a part of the administrative file, the complainant has already had the opportunity to make known his position on them, contrary to his assertion in his submissions. The 'fundamental right to express one's views' referred to by the complainant is available to him each year when his staff reports are drawn up."

The document demonstrates that the complainant's character, as revealed by his personnel file, did play a role in the appointing authority's decision. The differences within the Administration concerning the complainant's application are also evidence of that fact. The deputy Chief of Common Services was from the start opposed to his appointment, since the short list he proposed to the Appointment and Promotion Board did not include the complainant. The Board itself selected five candidates, including the complainant. The Chief of Common Services proposed to the Secretary-General the appointment of Ms B. or, failing that Ms H., and specifically excluded the other three candidates. The acting Chief of Personnel, however, was of the opinion that the complainant should not be discarded and had even proposed that the Secretary-General appoint him to the post. In the end the Secretary-General endorsed the proposal of the Department concerned , that is the Common Services, in the belief that its Chief could not be accused of not having taken all the facts into consideration. The Board of Appeal, after reaching the opposite conclusion in its initial report, found in its amended report that the Chief of Common Services' decision against recommending the complainant was based not only on professional considerations, but also on his interpersonal relations. In the case which gave rise to Judgment 1646, the Union already cited the complainant's difficulties in his relations with colleagues as a reason for not accepting his application.

The Appeal Board's amended report also shows that, in the Union's statement of reasons, the complainant's difficulties with interpersonal relations were taken into account, as they were referred to frequently in his personnel file.

According to the complainant and the Appeal Board, his personnel file affords no grounds for drawing unfavourable conclusions about his relations with his colleagues, but reveals only earlier difficulties he had with his supervisors. What needs to be ascertained, therefore, is whether the decision was flawed on this point by some mistake of fact.

8. The Union argues that the list drawn up by the Appeal Board concerning the documents in the complainant's personnel file shows the "existence of several exchanges of various sorts of messages commenting on the complainant's attitude, which made relations with other employees in his service or related services difficult".

In its initial report, the Appeal Board found that the personnel reports in the complainant's file revealed problems only in the relatively distant past and only with his supervisors. In its amended report, the Board considered that its first report was no longer valid and discussed new evidence provided by the parties. With regard to his personnel file, it noted in particular that "there is an inconsistency between the appraisals (good and even excellent) in [the] staff reports and the impression gleaned from correspondence ... relating to the periods in question". The Appeal Board concluded in particular that "the reasons for the order of preference in the recommendation by the Chief of the Common Services Department were based not only on professional criteria, but also on relational criteria which are not fully conclusive, notwithstanding the memorandum" of 29 March 1994. The Board also indicates that the relational problems were prior to the period when the complainant assumed the duties of acting Head of the Archives Service.

9. At the Tribunal's request the Union produced the documents cited. They largely bear out the ITU's assertions. They show that, during his long period of service in the library, his supervisors complained regularly, as from 1984-1985, of his rigid character, which made his relations with them

difficult. For example he had difficulty in accepting some of their instructions and, often, their authority. It also hampered relations with his colleagues. The remarks made to him on the subject appear not to have had any lasting effect. It should be noted that his annual staff reports for the three years from 1 May 1990 to 30 April 1993 contain no remarks; however, those three reports had been kept by his supervisor before being finalised, and were then signed by him without comment. But negative comments again emerged in the report for the following year and in the letters exchanged in 1994 and 1995. A memorandum of 30 October 1995 from the Chief of Common Services to the Chief of Personnel envisages the complainant's transfer from the Library to the Archives Service by 1 January 1996 at the latest and recalls his persistent problems in the Library. The single report covering the period from 1 May 1994 to 30 April 1997 rates him as "very good" on all points with no further comment.

Covering a period of over ten years, those observations gave the Secretary-General grounds for concluding that the complainant's character was such as to raise serious doubts about his aptitude to discharge the duties of Head of the Archives Service. That conclusion, based on documents in his file and the recommendation of the Chief of Common Services, who knew the complainant, is founded on objective evidence.

10. Consequently, the Secretary-General was not guilty of bias when, having considered the applicants' professional and personal aptitudes, he found the two candidates who were successively selected for the post more apt than the complainant to perform the duties of the post.

That being so, there is no need to pursue further the question of whether, in purely professional terms, they were more competent than he.

11. The complainant claims the right of preference which is accorded, when candidates are equally competent, to internal applicants and to nationals of a State which is under-represented.

In view of its objective, which is to secure the best possible employees for an organisation, equality of competence applies to all the abilities required of an employee, both professional and personal.

The Secretary-General did not overstep his discretionary authority by concluding that the overall aptitude of the candidates was not equal. The plea must therefore fail.

12. Since his main claim fails, so too must the others. The complainant suffered no unlawful injury to his career, since he did not meet all the requirements for appointment. Furthermore, the ITU could not have impaired his dignity by mentioning his difficulties with fellow employees, since they were recorded in the dossier. Lastly, he may not complain about the consequences of an internal appeal procedure which he initiated and which did not succeed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

NINETY-FIRST SESSION

***In re* Pinto (No. 4)**
(Application for execution)

Judgment No. 2075

THE ADMINISTRATIVE TRIBUNAL,

Considering the second application for the execution of Judgment 1646 filed by Mr Antonio Pinto on 8 November 2000, the reply by the International Telecommunication Union (ITU) of 18 January 2001, the complainant's rejoinder of 6 February and the ITU's letter of 9 March 2001 waiving its right to submit a surrejoinder;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case are set out in Judgments 1646 (*in re* Pinto) and 1743 (*in re* Pinto No. 2). In the former judgment, delivered on 10 July 1997, the Tribunal set aside a decision to reject the complainant's application for the post of Head of the Registration and References Unit, under the reference CF15/P3/907, and appoint another candidate. Finding the process to have been unlawful the Tribunal ruled that "The Union must now carry out anew the procedure for filling the post, this time in keeping with the rules. It may, however, in the meantime take whatever action it wishes to ensure that the work is still done ...". On 27 November 1997 the complainant filed an application for the execution and interpretation of that judgment; his intent was that the Union should appoint him directly to the post without readvertising it.

The ITU did put the post up for competition again, on 4 February 1998 but this time under the title "Head of the References Unit". The next day the complainant explained in a memorandum to the Secretary-General that, in view of his application for execution and interpretation pending before the Tribunal it was "not possible for [him] to apply" for the post, but that he was "still a candidate for the same post under the [previous] vacancy notice". On 9 July 1998 the Tribunal delivered Judgment 1743 dismissing the complainant's application. In a memorandum of 11 August, the complainant requested the Secretary-General to draw up a new short list: the Tribunal having ruled, he was now a candidate for the post. The Secretary-General refused on 21 August. On 15 September the complainant reiterated his request, indicating that he was seeking assurance that the short list for the new competition had been lawfully established. On 21 September the Secretary-General again refused the request. The complainant filed an internal appeal against that decision on 27 October 1998 but withdrew it on 14 December, having discussed matters with the acting Chief of the Personnel and Social Protection Department.

On 7 January 1999 the notice of competition was cancelled. On 9 June 2000 the post was readvertised under the same reference but with a substantially altered job description and under the title "Terminologist".

B. The complainant observes that in Judgment 1646, under 14, the Tribunal dismissed his claim to damages on the grounds that the judgment afforded him satisfaction. While that may be the case in theory, he says, it is not so in practice since the duties of the post as described in the notice of 9 June 2000 have changed completely. As a result they no longer match his qualifications, so he cannot apply for the post.

He contends that, as a consequence "the injury caused him has become real, permanent and irreparable". That is why he presses his initial claim to compensation: 100,000 Swiss francs in moral damages and 320,000 francs for prejudice to his career. He seeks 5,000 francs in costs.

C. In its reply the ITU objects to receivability. It observes that the complainant bases his application on the decision of 9 June 2000 to put the post up for competition. According to Article VII(2) of the Tribunal's Statute he had ninety days in which to lodge a complaint. Having failed to do so he is time-barred.

Subsidiarily, the Union points out that the complainant declined to apply for the post when it was put up for competition on 4 February 1998. He thus wittingly excluded himself from the selection process. The Terminology, References and Computer Aids to Translation Section, in which the post is located, had to be reorganised following an increase in the number of languages used in Union documents. The Chief of the Department of Conferences accordingly revised the post description in the interests of the service. According to the ITU, proper execution of a judgment cannot imply freezing a situation or the duties and characteristics of a post indefinitely to the detriment of the organisation's interests and sound management.

D. In his rejoinder the complainant contends that after the competition was cancelled on 7 January 1999, he expected the same post to be put up for competition again. It was only by chance that, while classifying vacancy notices on 14 September 2000, he noticed that a post for a "Terminologist" advertised on 9 June 2000 had the same reference as the one for Head of the References Unit. He accuses the ITU of lack of transparency by failing to inform him that the post in question had been readvertised under a different title.

CONSIDERATIONS

1. Facts relevant to this case are set out in Judgments 1646 (*in re* Pinto) and 1743 (*in re* Pinto No. 2).

The ITU initially put the post of Head of the Registration and References Unit up for competition under the reference CF15/P3/907. The complainant's application was discarded and another candidate was appointed to the post.

Deeming that procedure to have been unlawful because the selected candidate did not meet the requirements set in the vacancy notice, the complainant came to the Tribunal, which set aside the impugned decisions and ordered that "The Union must now carry out anew the procedure for filling the post, this time in keeping with the rules".

In execution of that judgment, the Secretary-General cancelled the contested appointment and advertised the post again under the title "Head of the References Unit".

The complainant challenged that decision in an application for execution and interpretation, which gave rise to Judgment 1743. In his view, the ITU ought to have appointed him directly to the post instead of reannouncing the vacancy. Finding his interpretation to be at odds with Judgment 1646, the Tribunal dismissed his application.

However, the complainant did not apply for the new competition despite the Union's advice that he should do so in his own interests.

After completing the competition procedure, the Secretary-General cancelled the vacancy notice, the Chief of the Department of Conferences deeming none of the applicants suitable.

On 9 June 2000 the post was put up for competition once again under the reference CF15/P3/907, but with a different title and job description.

2. In his application filed on 8 November 2000, the complainant contends that the new job description deprived him of any chance of applying for the post. It therefore failed to execute Judgment 1646 properly and thus denied him the benefit of that judgment. Claiming injury which has "become real, permanent and irreparable", he seeks payment of 100,000 Swiss francs in moral damages and 320,000 francs for prejudice to his career, as well as 5,000 francs in costs. These damages, he says, arose from the failure to execute the judgment, not from the decision set aside by Judgment 1646, in which the Tribunal saw no reason to entertain his claim to damages since he was afforded satisfaction.

The Union argues that the application is irreceivable because it is time-barred under Article VII of the Tribunal's Statute. In subsidiary pleas it contends that the third competition shows no breach of Judgment 1646. As to the second competition, it maintains that the complainant was duly informed of it and has only himself to blame if he declined to apply. It was because that competition was unsuccessful that the Union adjusted the job description to its requirements.

In his rejoinder, the complainant states that he learned of the third vacancy notice on 14 September 2000 only by chance.

3. There being no need to rule on receivability, the Tribunal holds that Judgment 1646 conferred on the complainant no right to be appointed after the post was readvertised. Nor did it prevent the ITU from concluding that the new competition had failed or from putting it up for competition anew under different conditions if the interests of the organisation so required (see Judgment 1771, *in re* De Riemaeker No. 4, under 4, paragraphs (c), (d) and (e), and the cases cited therein).

Furthermore, the Union is not to blame for the complainant's failure to participate in the second competition, since it duly pointed out that it was in his interests to apply for the post.

4. Since his main plea fails, so too must the others.

DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment, adopted on 9 May 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

NINETY-FIRST SESSION

***In re* Trambelland** **Judgment No. 2076**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr François Trambelland against the World Health Organization (WHO) on 9 November 2000, the WHO's reply of 9 February 2001, the complainant's rejoinder of 8 March and the Organization's surrejoinder of 19 April 2001;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who was born in 1953 and holds French and Swiss nationality, entered the service of the WHO on 1 March 1984. He was promoted to grade G.4 as from 1 February 1989 as a clerk in the Records Management Section (hereinafter the "Registry") within the Division of Conference and General Services. Up to 1996 he was mainly responsible for sorting correspondence and maintaining files.

From January 1996 the work of the Registry was reorganised. A computerised system of records management was introduced. Thereafter, the nature of his duties changed. A generic post description for several posts in the Registry was finalised in 1999. In October 1999 the complainant's post of clerk was reclassified from grade G.4 to G.5 and he was promoted to G.5 with effect from 1 October 1999.

On 18 November the complainant wrote a memorandum to the chief of the Registry asking for the effective date of his promotion to be changed to 1 January 1996. In the absence of a reply the complainant appealed to the Headquarters Board of Appeal on 17 December 1999 against the effective date for the reclassification of his post and hence of his promotion, arguing that he had assumed new duties as from 1 January 1996. In a rejoinder, submitted to the Board in March 2000, he claimed either a change of the effective date to 1 January 1996 – or compensation for undue delay of an amount equal to the difference in salary and benefits that he would have received had he held grade G.5 from that date.

In its report of 15 May 2000 the Board took note of the fact that at a unit meeting of the Communications, Records and Conference Services (CRC) on 27 June 1995 it had been decided that post descriptions for staff in the Registry would be drawn up twelve months after the new systems were put in place, but that had not happened in the expected timescale. The Board found that the earliest date at which the Administration could have drawn up a new post description was January 1997 and, consequently, an outcome from the reclassification process could have been expected by September 1997. Moreover, the delay had occurred through no fault of the complainant and compensation was therefore due to him. It recommended: paying him a sum equivalent to the difference between his actual earnings for the period from 1 September 1997 to 30 September 1999 and the amount he would have received had he been promoted to grade G.5 on 1 September 1997; placing him forthwith on the salary step he would have reached had his promotion occurred at that date; and reimbursing his legal costs for the internal appeal procedure, up to a limit of 2,500 Swiss francs, on submission of bills.

In a letter of 15 August 2000, the impugned decision, the Director-General partially endorsed the Board's recommendations. She agreed with the Board's recommendation regarding compensation, but did not concur with the Board's proposal regarding his step. She agreed to the reimbursement of legal costs up to an amount of 2,500 francs provided that the complainant produced bills and had no insurance coverage for legal fees.

The complainant was paid compensation in the sum of 14,230 francs. In a letter of 3 April 2001 the complainant was informed that the Director-General had decided to bring forward the effective date of the reclassification of his post to 1 September 1997 and that consequently his promotion would take effect from that date.

B. The complainant has two pleas. First, his promotion should have taken effect from the date he was assigned new duties: that is on 1 January 1996. He draws special attention to a document listing his duties which he appended to each of his performance appraisals for 1996-98 and 1998-99: both documents were headed "New duties performed since 1st January 1996" and at no stage did his supervisors contest their accuracy.

There was unreasonable delay on the part of the Organization in processing the new post description despite his requests. In fact, his initial requests to the Administration went unanswered. He seeks redress because the classification review of his post was unduly delayed. As was pointed out by the Board of Appeal, the delay in finalising a revised post description was not of his making. Citing the case law he contends that when reclassification has been delayed and the staff member cannot be held responsible, it should be put into effect from the date on which the official took up his duties.

Second, the Organization failed to respect substantive principles regarding the grading of posts. It did not adhere to Manual paragraph II.1.210 which indicates that if a staff member is assigned new duties not included in his post description, for a period of more than ninety days, a "new post description should be established and a classification review undertaken … to determine the grade of the post …". It was known at the outset that the change in his functions was to be permanent and his supervisors should have paid heed to the terms of that paragraph; but action was only taken some three and a half years later. He argues that he was one of a group of staff members performing identical duties but holding different grades, ranging from grade G.4 to G.6. In allowing that situation the Organization failed to comply with the principle of "equal pay for work of equal value", as provided for in Manual paragraph II.1.30.1.

He sees inconsistency in the impugned decision, in that the Director-General allowed compensation but refused to grant him the step adjustment. In the amount of compensation paid to him the Organization took account of the fact that he would have attained step 11 in grade G.5 on 1 September 1998. But because he was denied the step, his salary was set at step 10 in G.5 on 1 October 1999. Besides which, no reasons were given for refusing the increment. He deems it improper for the WHO to refuse to reimburse his legal fees on the grounds that they may be covered by an insurance policy. The Organization is seeking to benefit from a policy to which it has not contributed.

The complainant seeks the quashing of the impugned decision. He wants the effective date of his promotion changed to 1 January 1996 and accordingly requests payment of all entitlements due since that date (less the sum that he has already been paid). He claims interest on all arrears. In addition, he claims 6,000 Swiss francs in costs to cover the proceedings before the Board of Appeal and the Tribunal.

C. The Organization replies that payment of compensation afforded the complainant adequate redress, and he has suffered no loss. No deductions were made for health insurance and pension fund contributions and so he in fact received more in monetary terms that he would have obtained if he had been promoted from 1 September 1997. In his internal appeal the complainant sought a change in the date of the reclassification of his post – or compensation; he had therefore in principle accepted that he could be paid compensation. The outstanding issue is to determine from what date.

The complainant misinterprets Manual paragraph II.1.210. The latter simply requires that if the period of assignment of new duties exceeds ninety days a new post description should be established and a reclassification process undertaken; it does not define a time limit. It would not have been possible on 1 January 1996 to determine what functions staff in the Registry were going to be performing. The complainant's duties were not fixed at that date – they were expected to evolve. Besides, he ignores the amount of time needed for undertaking a classification review. No rule requires that such a review should take place on the date when the duties start changing. His case cannot be seen in isolation. Efforts had to be made to finalise the reclassification process for all staff members affected by the reorganisation of the section and it took longer than initially anticipated. Only part of the automated system was in operation at 1 January 1996. It was only in early 1997 that the system was fully operational.

The WHO sees no justification for paying the complainant interest. The award he received represented compensation – it did not constitute overdue monthly payments. As for his claim to legal fees in the context of his internal appeal, he merely had to confirm that he would not be reimbursed twice for the same costs. Otherwise it would lead to unjust enrichment on his part. The Organization has not yet received such confirmation from the complainant.

D. In his rejoinder the complainant states that if staff suffer loss when the Organization is instituting wide-scale changes it is the Organization that should bear the consequences. Although it is true that he proposed compensation as a means of redress in his submissions to the Board of Appeal, its recommendation fell short of what he had requested and the Organization sought to "whittle" the amount down further. That is why he reasserts his initial claim to promotion from 1 January 1996.

He maintains his claims for redress including his claim to interest. Certain colleagues were performing the same tasks as him from 1 January 1996 and were already on grade G.5, but he had to "wait years" before his right to equal treatment was recognised and so the redress paid to him should include interest to compensate for the delay. As regards legal fees for the internal appeal procedure, he says a letter was sent to the defendant Organization on 16 February 2001 confirming that he had not received any payment from an insurer.

E. In its surrejoinder the Organization states that after the filing of its reply the Director-General had exceptionally decided to make the complainant's promotion retroactive to 1 September 1997. That decision was notified to the complainant in a letter of 3 April 2001. The complainant's claim that the payment of compensation did not form adequate relief is therefore no longer of relevance and the only remaining issue is the date at which his promotion should take effect. It holds that 1 September 1997 was the proper date because it was the earliest possible date by which the classification review could have been completed. The complainant's staff reports do not provide evidence that the duties of his post were settled as from 1 January 1996; his claims on that score have no legal basis. Furthermore, there was no breach of equal treatment because the complainant was treated in the same way as colleagues in the Registry who were in the same position in law and in fact.

The Organization points out that the issues regarding legal fees are no longer relevant since the complainant received reimbursement for costs up to 2,500 francs in accordance with the Director-General's decision of 15 August 2000.

CONSIDERATIONS

1. The complainant has served the WHO since 1 March 1984. In 1989 he was assigned to the Records Management Section (the "Registry") in the Division of Conference and General Services. Following far-reaching structural changes in that Division, including computerisation as from 1 January 1996, the complainant's duties at grade G.4 were modified. He asked the WHO several times to change his job description and upgrade his post to G.5, but not until 20 October 1999 did he receive a copy of a memorandum, dated 12 October, notifying the reclassification of his post to G.5 as from 1 October 1999. In response the complainant asked the chief of the Registry in a memorandum of 18 November 1999 to change the effective date of his reclassification to 1 January 1996. Having got no reply he appealed to the Headquarters Board of Appeal.

2. The Board met on 19 April and 5 May 2000 to hear his appeal. It noted that the reclassification process had been slow, particularly between January 1997 and July 1998, and concluded that a new post description should have been prepared and submitted for classification as from January 1997, and that September 1997 would have been a reasonable deadline for a decision. It found that the complainant had done "all that could be reasonably expected of him to comply with the WHO's rules on annual performance reports and the description and regrading of his post" and that, in view of serious breaches of the rules for which the Organization alone was to blame, he was entitled to compensation in an amount equal to the difference between his earnings for the period from 1 September 1997 to 30 September 1999 and the amount he would have received had he been promoted to G.5 as from 1 September 1997. The Board also recommended giving him forthwith the within-grade step he would have reached had he been promoted to G.5 on 1 September 1997, and repaying his lawyer's fees up to an amount of 2,500 Swiss francs on submission of the bills.

3. The Director-General took her decision on 15 August 2000: "in the light of all the evidence and particularly the delay in processing the request for post reclassification", she endorsed the Board's recommendation to pay the complainant compensation and reimburse his legal fees. She refused, however, to grant him the within-grade step he would have reached had he been upgraded as from 1 September 1997 – in other words to rebuild his career with retroactive effect.

4. Dissatisfied with that decision, the complainant has come to the Tribunal pleading inadequate redress. In his submission he is entitled to promotion with retroactive effect and not simply compensation equal to the difference between the amount he ought to have been paid at grade G.5 and what he was actually paid up to 1 October 1999; furthermore, the promotion should have taken effect as from 1 January 1996. He seeks interest on the amounts due from the Organization and challenges the conditions set by the WHO for cover of his legal fees relating to the internal appeal procedure.

5. Since the complaint was filed, the WHO has reconsidered its denial of promotion with retroactive effect. A letter of 3 April 2001 informed the complainant of the Director-General's decision to make 1 September 1997 the effective date of the reclassification of his post and hence of his promotion to grade G.5. The requisite administrative steps were to be taken as soon as possible to make the necessary retroactive adjustments, in particular to his contributions to the pension fund and sickness insurance scheme.

6. That decision has partly devoided the complainant's main claims of any purpose. However, they still show a cause of action insofar as the decision grants him promotion as from 1 September 1997 whereas in his submission, his reclassification should have taken effect as from 1 January 1996 and so too should his promotion to G.5.

7. In support of his plea that the Organization is wrong to persist in denying him promotion with retroactive effect, the complainant seeks to show that the duties he has actually performed since 1 January 1996 are those of a grade G.5 official. He cites a document appended to each of his performance appraisals for 1996-98 and 1998-99 listing, inter alia, the additional duties he says he performed during those reporting periods. He points out that his supervisors did not dispute the accuracy of those documents and gave him excellent performance appraisals. Furthermore, although both parties recognised the need to revise his post description, the Organization bore sole responsibility for the delay in processing his request which, he says, constituted a breach of Manual paragraph II.1.30 setting rules for post classification, and Manual paragraph II.1.210 which says:

> "A staff member may be assigned new duties not included in the post description on a full-time basis for a temporary period not exceeding 90 days. If the period exceeds 90 days, a new post description should be established and a classification review undertaken ... to determine the grade of the post."

8. The Headquarters Board of Appeal found that there was an inordinate delay in processing the complainant's request for upgrading, but that the Organization was right, before drawing up new job descriptions, to wait for the situation to settle down following the structural changes and

the resulting difficulties: the installation of a new computer system, a changing situation and the evolving nature of staff duties. The Tribunal endorses that opinion and, in the light of all the material circumstances, sees no reason to question the Board's conclusion that the Administration should have been in a position to prepare a new job description as from January 1997 and to take the necessary decisions by September 1997 at the latest. The complainant was entitled to claim reclassification under Manual paragraph II.1.210, more than ninety days having elapsed since his duties changed on 1 January 1996. However, that rule on its own lays no obligation on the Administration to prepare a new post description immediately, as the WHO observes. It must, nonetheless, do so within a reasonable period. Although it did not, the measures it eventually took on the basis of the Board's recommendation afforded the complainant redress for the injustice done.

9. In the light of the most recent decision, which benefited him, the complainant has failed to prove that the WHO treated him differently from his colleagues or showed any animosity towards him.

10. The complainant claims interest on the amounts the Organization owes him. The WHO agreed to promote him to G.5 with retroactive effect to 1 September 1997, and even if it qualified that decision as exceptional in its surrejoinder, it should have paid him each month from that date the salary and entitlements corresponding to grade G.5. He is therefore entitled to interest, which the Tribunal sets at 8 per cent a year on those monthly earnings from each due date as from 1 September 1997.

11. Lastly, the complainant asked the Appeals Board to award him 2,500 Swiss francs to cover his legal fees during the internal procedure. The WHO states that it has paid him that amount. That being so, his claim no longer shows a cause of action.

12. The complainant is entitled to costs, which the Tribunal sets at 5,000 francs.

DECISION

For the above reasons,

1. There is no need to rule on the complainant's claim to the quashing of the Director-General's decision insofar as it did not grant him promotion with retroactive effect, or on his claim to payment of the costs incurred in the internal procedure.
2. The impugned decision is set aside insofar as it refuses to pay the complainant interest on the amounts due to him.
3. The amounts that the WHO shall pay the complainant in implementing the Director-General's decision of 3 April 2001 promoting him to grade G.5 as from 1 September 1997 shall bear interest at 8 per cent a year as from their monthly due dates.
4. The WHO shall pay the complainant 5,000 Swiss francs in costs.
5. His other claims are dismissed.

In witness of this judgment, adopted on 9 May 2001, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

(Signed)

MICHEL GENTOT SEYDOU BA HILDEGARD RONDÓN DE SANSÓ

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative

NINETY-FIRST SESSION

***In re* D'Arcangelo** **Judgment No. 2077**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Raffaele D'Arcangelo against the International Training Centre of the International Labour Organization (ILO) on 6 October 2000, the Centre's reply of 15 December 2000, the complainant's rejoinder of 12 January 2001 and the Centre's surrejoinder of 13 February 2001;

Considering Article II, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Italian citizen who was born in 1949, joined the International Training Centre of the ILO in Turin in 1971. He was recruited as an administrative assistant at grade G.3 on a fixed-term contract, which was regularly renewed until 1 November 1994, when he was granted a contract without limit of time. In the meantime he had been promoted to grade G.4 in December 1973, and to grade G.5 in March 1980.

Between 14 June and 31 December 1995, the complainant was assigned as a programme assistant at grade G.5 to the Small Enterprise Development Programme. In the appraisal of his performance drawn up in July 1995, in the section "Personal career goals and expectations", he indicated his wish to be transferred and gradually incorporated into the teaching staff of the Training Department. In a confidential letter of 27 November 1995 he complained to the Director of the Centre that his current job offered no prospects for his becoming a teacher and asked for the situation to be remedied. On 15 January 1996 a career development plan, divided into three stages and covering the period from January 1996 to December 1997, was sent to the complainant. Attached to it was a job description for a post as junior programme officer at grade P.2 in the Training Department. The first stage of the plan (January-June 1996) was defined as a trial and training period consisting of a secondment to the Regional Programme for Africa. Thereafter, a written appraisal would determine any modifications needed to complete training during the second stage (July 1996-September 1997). A final progress appraisal would determine whether or not he embarked on the third stage, when he would be given an assignment as a training programme officer.

On 7 March 1997 the Senior Personnel Officer sent the complainant for comment the interim performance appraisal drawn up as part of his career development plan. In its conclusions the appraisal indicated that during the period in question the complainant had displayed an attitude which was not "really adapted to teamwork and made it difficult for him to acquire the basics for becoming a trainer". In a minute of 25 March 1997 the complainant sent his comments to the Senior Personnel Officer, challenging the appraisal on all points. In his reply of 9 June 1997 the latter informed him that he would not be completing the career development plan because he lacked the profile of a trainer. He therefore proposed to contact the Training Department to find him a post involving duties and responsibilities that were better suited to his profile.

On 23 April 1998 the complainant, the programme officers and the Senior Personnel Officer signed a document entitled "Terms of reference regarding training in the Regional Programme for Africa". The document, which concerned the continuation of the complainant's training listed his duties and envisaged an appraisal by the programme officers in December 1998. Between 14 January and 9 July 1999, the programme officers sent their appraisals to the Senior Personnel Officer. The complainant challenged one of them in a minute of 13 July. On 23 September the matter was referred to the Reports Committee. In the context of a reorganisation of the Training Department the Director of the Department asked the complainant, in a minute of 22 October 1999, to accept a temporary assignment as a programme assistant in one of the Department's technical or regional programmes. The complainant replied on 28 October, informing him of his wishes – namely to be attached to the Technical Programme on Enterprise Development. On 1 December 1999 the Director of the Department informed the complainant that he could not accede to his wishes and offered him a temporary six-month assignment within the Training Department, starting in January 2000. After a further exchange of correspondence, the complainant filed an internal complaint on 28 February 2000 with the Director of the Centre, challenging the decision of 1 December 1999 to transfer him temporarily.

In the meantime, on 8 February 2000, the Reports Committee recommended to the Director of the Centre that the complainant be maintained in a position where he could "maximise his capabilities and minimise his weaknesses" or remain in the Training Department in a support function where he could put into practice the points that he had already learnt. On 27 March the Director asked the Committee for a supplementary report, which was sent to him on 14 April. On 12 May he informed the complainant that he endorsed the recommendations of the Reports Committee. He then asked the complainant's direct supervisor to propose how best to implement the recommendations; that proposal would serve as a basis for his decision as to where the complainant would ultimately be assigned. In a minute of 15 June, entitled "Your definitive assignment", the Director offered the complainant a post as programme assistant at grade G.6 in the Training Department as from 1 July 2000. The complainant replied on 20 June that he would take up his new post on the date envisaged. However, he said he was maintaining his internal complaint of 28 February 2000 against the decision of 1 December 1999 concerning his temporary transfer and was filing another one challenging the decision concerning his definitive assignment. His claims included the setting aside of the two decisions and the pursuit of his career plan with a view to his subsequent appointment as a programme officer at grade P.2.

By a letter of 18 August 2000, which is the impugned decision, the Director of the Centre rejected both internal complaints.

B. The complainant contends first that Article 0.5(a) of the Staff Regulations of the Centre was breached because the decisions concerning his temporary transfer and his definitive assignment took account neither of his professional profile nor of the qualifications he had acquired with a view to being appointed to a post at grade P.2. He adds that the Administration may not order "authoritarian transfers": it must obtain the consent of the official concerned except in the event of emergency or *force majeure*, which was not the case here. Moreover, his definitive assignment was decided upon without his consent, in breach of the commitments made previously by the Director of the Centre.

Furthermore, the Centre failed to honour its commitments regarding training and promotion. The career development plan of January 1996 was not completed, not by any fault of his but due to the "failings" of the Centre.

The complainant also asserts that he was the victim of discriminatory treatment. By way of illustration he explains that unlike other officials he had to abide by a career development plan, and that the procedure for the appraisal of his performance was flawed: subjective and "unfavourable bias" carried more weight than the very favourable appraisals from some of his supervisors. Moreover, the Centre wilfully ignored some important professional initiatives he had taken, thereby overlooking significant facts.

Lastly, by refusing to provide him with the two reports of the Reports Committee in full the Centre deprived him of information essential to his defence.

He concludes that his career was blocked at grade G.6, which prevented him from entering several competitions for posts in the Professional category. He adds that the offending decisions also harmed his good name, as he was suspected of professional incompetence.

The complainant asks the Tribunal to set aside the decisions of 1 December 1999, 15 June and 18 August 2000 and to order his appointment to a post as programme officer at grade P.2. He also claims material and moral damages, and costs.

C. In reply the Centre submits that the decisions concerning his temporary and definitive assignments were taken in accordance with the Staff Regulations and took due account of his qualities, skills and experience. Appraisals of his performance were carried out regularly. The Centre affirms that assessment of an official's performance is at the discretion of the Director and that, in accordance with its case law, the Tribunal's power of review over such decisions is limited: it will interfere only on specific grounds, which are absent in this case, since the Director was careful to ensure all the procedural guarantees in reaching a "just and equitable" decision. Career plans and terms of reference always involve an element of uncertainty, and whether or not their ultimate objective is attained depends on how well the official fares. If performance appraisals are negative and there is no flaw in the reporting procedure – which was so in the complainant's case – the expected outcome will not be achieved. The Centre adds that, under the terms of Article 0.5 of the Staff Regulations, the consent of an official is not required in the event of a new assignment. Such decisions are at the Director's discretion.

The complainant has adduced no conclusive evidence of any flaw in the reporting procedure. Nor can the Centre be held responsible for the failure of the 1996 career development plan.

If the complainant believed he had fallen foul of discrimination, he could have challenged the lawfulness of his career development plan. But he in fact agreed to it freely, having negotiated its terms. His position in law is, therefore, unlike that of the officials he cites and for whom no career plan was developed. The Centre points out it did not overlook his initiatives and that they could have led to disciplinary sanctions, as he established contacts outside the Centre without having the authority to do so.

Lastly, the Centre observes that it agreed to divulge the reports of the Reports Committee in their entirety and that the Tribunal is not competent to order the appointment of the complainant to grade P.2.

D. The complainant rejoins that although the Director has discretion over the assignment and promotion of officials, he ought not to have exercised that authority in disregard of essential facts such as, in this case, the favourable appraisals from at least three of his supervisors. He indicates that the consent of an official to a new assignment is not compulsory but "desirable", and that the terms of reference of 23 April 1998 stated that he had responsibilities regarding the design, promotion and negotiation of activities on behalf of the Centre. He adds that, in providing him with the reports of the Reports Committee in their entirety, the Centre met his request.

E. In its surrejoinder, the Centre presses its pleas and observes that the complainant was not authorised to exercise the responsibilities in question.

CONSIDERATIONS

1. The complainant joined the staff of the International Training Centre of the ILO on 1 February 1971 as an administrative assistant at grade G.3. Having occupied several posts, including one at grade G.4 and then two at grade G.5, he informed his employer in July 1995 that he would like gradually to transfer to the Centre's Training Department as a member of its teaching staff.

On 8 January 1996 he was told that as from 9 January he would be assigned at the same grade to the Regional Programme for Africa for six months. He replied on the same day that he would agree neither to that assignment nor to any other unconditional and temporary transfer and that he was awaiting written proposals for a "future professional career plan".

2. The upshot was that on 15 January 1996 he and the management of the Centre agreed on a three-stage career development plan. The first stage consisted of a trial and training period from January to June 1996, which involved transferring the complainant to the Regional Programme for Africa. Upon completion of stage one the complainant's work, particularly his administrative tasks, was to be assessed in a written report. During the second stage (July 1996 to September 1997), which would focus more specifically on training, he was to familiarise himself with the work of managing training programmes. A final appraisal of his progress in the design and management of such programmes was to be made in

September 1997. If it was favourable he would go on to the third stage, when he would be given an assignment as training programme officer at grade P.2.

3. In March 1997 the complainant's performance was assessed at the end of the first stage of his career development plan, and he challenged the appraisal on all points. The appraisal having found that his attitude had not been "really adapted to teamwork and made it difficult for him to acquire the basics for becoming a trainer", the Administration decided against completing the plan and chose instead to look for a post with duties and responsibilities better suited to his profile.

4. On 23 April 1998 the complainant and the management of the Centre signed a document entitled "Terms of reference regarding training in the Regional Programme for Africa". It set out the tasks, including the design and management of training programmes, that the complainant was to carry out under the responsibility of and in association with the programme officers. It also envisaged that in December 1998 the latter would prepare an appraisal and send it to the complainant and to the Administration in order to complete the documentation needed for the classification of his post pursuant to the procedures in force.

On 14 January, 30 March and 9 July 1999 the programme officers submitted their appraisals, which, according to the Centre, taken individually covered the terms of reference only in part. In a minute of 13 July 1999 the complainant challenged one of the appraisals.

The Administration then decided to refer the matter to the Reports Committee, the statutory body competent for matters concerning performance appraisals and promotion. The Committee was to review the three appraisals and make recommendations as to the classification of the complainant's job, having obtained any additional information it might need from the complainant and the three programme officers.

5. At the end of 1999, before the Reports Committee made recommendations the Training Department, where the complainant worked, was reorganised and the complainant was assigned temporarily

at the same grade as a programme assistant pending a final decision in the light of the Committee's report.

After a further exchange of correspondence with his supervisors, the complainant lodged an internal complaint on 28 February 2000 "against the decision to transfer him to another service" taken by the Director of the Training Department on 1 December 1999.

The Reports Committee issued a first report on 8 February 2000 and, at the request of the Director of the Centre, a supplementary report on 14 April 2000.

In its reports, the Committee concluded that the complainant's duties corresponded more to those of a competent programme assistant, than to those described in the terms of reference. It made the following recommendations:

> "At this stage, the Committee cannot but recommend that Mr D'Arcangelo:
>
> (a) be maintained in a position where he can maximise his capabilities and minimise his weaknesses. The Centre could probably use his education and intellectual and conceptual capabilities in one of the upstream activities, or, alternatively,
>
> (b) be maintained in the Training Department in a support function where he could put into practice the points that he has already learnt and improve them until such time as a favourable appraisal suggests that [the level of] his job be reviewed, in accordance with the Centre's procedures in force."

The Director of the Centre endorsed the Reports Committee's recommendations and informed the complainant on 15 June 2000 that, having ascertained what suitable posts were available in the Centre, he was in a position to offer him a post as programme assistant at grade G.6 in the Training Department.

On 20 June the complainant indicated that he was maintaining the internal complaint filed on 28 February 2000 against the decision of December 1999 concerning his temporary assignment, and was filing another one against the decision of June 2000 on his definitive assignment. On 18 August 2000 the Director of the Centre rejected both internal complaints. It is this latter decision which is impugned in the present complaint.

6. The complainant requests the Tribunal to set aside the decisions of 1 December 1999, 15 June and 18 August 2000 and to order his appointment to a post as programme officer at grade P.2. He claims compensation for the material injury caused by the "delay" in implementing the training plan, which was to have resulted in his promotion and for the moral injury caused by the discriminatory treatment to which he says he was subjected. He also claims costs. In support of his claims he contends that there was a breach of Article 0.5 of the Staff Regulations, that the Centre failed to comply with the commitments it had made to him, that he was subjected to discriminatory treatment and that information was withheld.

Withholding of information

7. This plea no longer shows a cause of action, since in his rejoinder the complainant recognises that his demands have been met, the Centre having produced the Committee's reports.

Breach of Article 0.5 of the Staff Regulations

8. It should first be recalled that, according to a steady line of precedent (see in particular Judgment 810, *in re* Najman No. 5, under 5) the Tribunal will quash decisions respecting appointments only if they were taken *ultra vires*, or show some formal or procedural flaw or a mistake of fact or of law, or if some essential fact was overlooked, or if there was abuse of authority, or if a clearly wrong conclusion was drawn from the evidence.

9. The complainant alleges breach of Article 0.5 of the Staff Regulations in that the Centre's decisions about his temporary assignment and his definitive assignment overlooked both his professional profile and his qualifications, despite the provision in paragraph (a) of Article 0.5 that: "The director shall assign an official to his duties and his duty station subject to the terms of his appointment, account being taken of his qualifications." The complainant observes that over the past five years he has followed training modules intended to qualify him for a post of

programme officer and has obtained a master's degree in economics, but that the decision of 1 December 1999 to assign him temporarily to a post of programme assistant stated neither the grade of the post nor what was required in terms of training, experience, language skills and personal aptitudes. Moreover, the duties he was to perform were purely administrative and involved no activities relating to the preparation, implementation or evaluation of training programmes. Consequently, they matched neither the qualifications he had acquired, nor his wishes, nor his career development plan.

10. The Centre asserts that the decision about the complainant's temporary assignment was taken in accordance with the Staff Regulations and took due account of his qualities, skills and experience without in any way impairing his position in law.

11. With regard to the decision of 1 December 1999, the Tribunal, in line with its case law, will not replace the Centre's assessment with its own. It finds that, since the career development plan was not completed and the Reports Committee had not yet made its recommendations, there is no objective evidence that the Centre overlooked the complainant's aptitudes or offended against Article 0.5 of the Staff Regulations. The above decision, consisting as it did in a temporary assignment at the same grade following a reorganisation of the Department in which he worked, in no way impairs the complainant's position in law and must therefore stand.

12. The complainant contends that the definitive assignment of 15 June 2000 is of the same nature as the temporary one: it involves no duties relating to programme preparation, implementation or evaluation; the work is essentially technical and administrative with no direct and personal involvement in training programmes.

The complainant submits that although the Director of the Centre has discretion over the assignment and promotion of staff, he must not overlook essential facts such as, in this case, the favourable appraisals of at least three of his supervisors. He asks whether the "majority appraisals" should not have prevailed over "certain minority, subjective and marginal criticisms".

13. The Centre notes that the decision of 15 June 2000 on his definitive assignment was taken after a long appraisal process to which the complainant agreed, and that the post of programme assistant in the Training Department was offered to him on the strength of appraisals by the people responsible for supervising him under the terms of reference negotiated in April 1998 and the Reports Committee's recommendations about the classification of his work. The Centre adds that the impugned decision took into account lawfully obtained information, the complainant's observations and the suitable posts available.

14. The decision is, as the complainant concedes, discretionary and as such may be set aside only on specific grounds as indicated under 8 above. Such decisions are subject to only limited review and the Tribunal will not substitute its own assessment for that of the Administration.

15. The Tribunal finds no breach of Article 0.5(a). The decision of 15 June 2000 was taken following appraisals by the persons responsible for supervising the complainant under the terms of reference that he had negotiated and agreed to sign, and after recommendations made by the Reports Committee at the outcome of a procedure untainted by any flaw. As to the complainant's plea that his supervisors' appraisals differed, the case law says that it is a safeguard for any staff member to be evaluated by more than one supervisor and to have them bring possibly different views to bear (see Judgment 1444, *in re* Moosai, under 11). In this case the complainant's aptitude for a teaching post was found to be wanting and nothing in the evidence shows any error of fact or any wrong conclusion, his supervisors being best placed to assess such aptitude.

16. The complainant submits that, even if the staff member's consent to a temporary or definitive assignment is not mandatory, it is desirable in the interests of both the organisation and the person concerned. He adds

that the Director himself emphasised in a speech that transfers carried out against the will of staff members are contrary to the principles of the ILO and that the Centre must assign employees to suitable posts that offer professional fulfilment and career prospects.

17. Apart from the fact that Article 0.5(b) of the Staff Regulations is immaterial, as the complainant concedes, the Tribunal agrees with the Centre that in his case it is not a question of transferring him from one position to another, but of seeking a suitable post for him taking into account his aptitude.

The complainant's observations on the need to obtain his consent are therefore irrelevant, nor can he cite the Director's speech in support of his argument. The plea therefore fails.

The Centre's failure to comply with its commitments to the complainant

18. The complainant objects that the Centre failed to honour the commitments to train and promote him which it made in the career development plan of 15 January 1996 and the terms of reference of 23 April 1998 with a view to helping him acquire the necessary skills and knowledge to perform the duties of a programme officer. He also objects that no post was envisaged for him upon the completion of his training. He adds that the plan was not completed – not by any fault of his own, but due to the failings of the Centre.

19. The Tribunal observes that the complainant has not proved that the Centre was in any way to blame for the non-completion of the plan. Moreover, it appears that what the Centre undertook through the plan was to afford him the means of acquiring the knowledge he needed to become a programme officer, but that it was unable to guarantee success since the outcome depended on several conditions, some of which concerned his abilities and aptitude.

Furthermore, the fact that the complainant agreed to negotiate and conclude terms of reference on being told that the career development plan could not be completed, rendered null and void both the plan and the commitments that it implied.

The decision under challenge was taken following an appraisal procedure which was properly conducted, and supplemented by the work of the Reports Committee. The Centre cannot, therefore, be accused of not honouring its commitments.

Discriminatory treatment

20. The complainant contends that he is the only staff member at the Centre to have been subjected to a three-stage career development plan involving specific tasks and appraisals, requiring the obtention of a postgraduate degree, and imposing satisfactory completion of the plan as a condition for his assignment as a programme officer. He cites the cases of two staff members who were transferred without such a plan, and without any specific conditions or requirements.

In his submission he fell foul of a discriminatory and subjective attitude on the part of some of his supervisors, who wilfully disregarded the positive appraisals he received and initiatives he undertook that were important for African countries and the Centre, thereby ignoring significant facts.

21. His plea of discrimination cannot succeed: he freely negotiated and accepted the career development plan and did not challenge it as unlawful.

Moreover, he offers no evidence that the staff members he cites were in an identical position to his own.

Finally, nothing in the evidence on file, particularly the information provided by the Centre, shows that the supervisors betrayed bias by overlooking significant facts, the more so as his initiatives for African countries were undertaken without the authorisation of the Centre or the Director's express consent.

22. The conclusion is that his claim to the quashing of the impugned decisions cannot succeed. The complaint must therefore be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2001, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

(Signed)

MICHEL GENTOT SEYDOU BA HILDEGARD RONDÓN DE SANSÓ

CATHERINE COMTET

NINETY-FIRST SESSION

***In re* Sokolov (No. 3)**
(Application for review)

Judgment No. 2078

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by Mr Dmitri Konstantinovich Sokolov on 25 September 2000 for review of Judgments 1940 and 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 7 of its Rules;

Having examined the written submissions;

CONSIDERATIONS

1. By Judgment 1999 delivered on 12 July 2000 the Tribunal dismissed as being clearly irreceivable a first application by the complainant for review of Judgment 1940. In the present application he seeks review of both judgments.

2. Judgments of the Tribunal carry the authority of *res judicata* and may be reviewed only in exceptional cases and on very limited grounds (Judgment 442, *in re* de Villegas No. 4).

3. The complainant has advanced no admissible grounds warranting review of either judgment. His plea is unsubstantiated and therefore clearly irreceivable. The Tribunal dismisses his application in accordance with the summary procedure set out in Article 7 of its Rules.

DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment, adopted on 3 May 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative

NINETY-FIRST SESSION

***In re* Le Grand**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs Françoise Le Grand on 23 June 2000 against the Customs Co-operation Council (CCC), which in 1994 became the World Customs Organization (WCO), the Council's reply of 29 September 2000, the complainant's rejoinder of 8 January 2001 and the CCC's surrejoinder of 5 April 2001;

Considering that by a letter of 5 April 2001 the complainant's counsel informed the Registrar of the Tribunal that the complainant wished to withdraw suit;

Considering that by a letter of 20 April 2001, the Council informed the Registrar that it had no objection to the withdrawal of suit;

Considering that suit is unreservedly withdrawn;

DECISION

The withdrawal of suit is hereby recorded.

In witness of this judgment, adopted on 9 May 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET